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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

THE STATE OF TEXAS,

Petitioner,

vs.

RONALD CURTIS CHAMBERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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January 19, 1990

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QUESTION PRESENTED

Can the requirement of *Batson v. Kentucky* that a prima facie case of purposeful discrimination be rebutted by a "clear and reasonably specific" explanation for exercise of the state's peremptory challenge be satisfied in a retrospective *Batson* hearing (concerning the exercise of the peremptory challenges in a capital murder prosecution) by testimony based on the prosecutor's review of the challenged veniremen's answers to written jury questionnaires and voir dire examination and the prosecutor's own habitual jury selection practices?

LIST OF PARTIES

RONALD CURTIS CHAMBERS,
Appellant below and Respondent herein

THE STATE OF TEXAS,[1]
Appellee below and Petitioner herein

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[1] The State of Texas is represented by the Dallas County District Attorney. See letter of authorization from Attorney General of Texas contained in Appendix.

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In The

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THE STATE OF TEXAS,

Petitioner,

vs.

RONALD CURTIS CHAMBERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on October 25, 1989, for which the State's motion for rehearing was denied on November 22, 1989. For clarity, reference to petitioner is by "State" or "Texas" and reference to respondent is by "Chambers."

OPINION BELOW

The opinion of the Court of Criminal Appeals, not yet reported, appears in the Appendix as *Chambers v.*

State, No. 69,609 (Tex. Crim. App. October 25, 1989). Attached to this opinion is an Appendix "A" of the opinion. This appendix constitutes the trial court's second set of findings of fact and conclusions of law regarding the evidence presented at a retrospective *Batson v. Kentucky* hearing conducted in the trial court on remand from the Court of Criminal Appeals. It was incorporated by reference into the opinion of the Court of Criminal Appeals.[2]

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[2] While State now seeks relief from the Court of Criminal Appeals Opinion of October 25, 1989, this opinion was actually the third opinion or order issued by the Court of Criminal Appeals with regard to the instant case. On initial submission of the direct appeal of Chambers' conviction, the Court of Criminal Appeals correctly determined that the case required the retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986). Accordingly, the Court of Criminal Appeals opinion of January 6, 1988, published as *Chambers v. State*, 742 S.W.2d 695 (Tex. Crim. App. 1988) ordered the appeal abated to the trial court for the purpose of allowing the trial court to conduct the *Batson* hearing. This hearing resulted in the production of the trial court's first set of findings of fact and conclusions of law. Following transmission of this document to the Court of Criminal Appeals, that court, upon receiving a supplemental brief from the State, concluded that the trial court had improperly refused to consider evidence offered by the State at the retrospective *Batson* hearing in the trial court. Accordingly, by its unpublished order of June 28, 1989, the Court of Criminal Appeals again ordered the appeal abated to the trial court so the trial judge could reconsider his first set of findings of fact and conclusions of law. The unpublished opinion of the Court of Criminal Appeals of June 28, 1989, is contained in the Appendix. The trial court's first set of findings of fact and conclusions of law are attached to this opinion as an appendix to the opinion of June 28, 1989.

JURISDICTION

The opinion of the Court of Criminal Appeals was entered on October 25, 1989. On November 6, 1989, the State timely filed a motion for rehearing. That motion was overruled, without further opinion, on November 22, 1989. On November 29, 1989, the State sent its motion for stay of mandate to the Court of Criminal Appeals to allow for time within which to file the State's Petition for Certiorari. This motion was granted by the Court of Criminal Appeals on December 5, 1989. Under the terms of this order, the issuance of the court's mandate was stayed until February 6, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, Section 1 states in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case involves prosecution and conviction of Chambers for the offense of capital murder[3] following

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[3] TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974) defined the offense of capital murder as murder committed pursuant to § 19.02(a)(1) of the Penal Code ("intentionally or

(Continued on following page)

a jury trial in Dallas County, Texas. After the return of the jury's verdict of guilty, the State presented additional evidence at the punishment phase of the trial and the jury returned unanimous "yes" answers to the two special issues submitted to it concerning the question of punishment. These affirmative answers, under Texas law, required the trial court to enter a sentence of death by lethal injection.[4]

Because the issue before this Court is **not** concerned with the evidence of Chambers' guilt, the sufficiency of evidence supporting the jury's answers to the special issues of punishment, or the constitutionality of the Texas capital murder scheme under which Chambers was convicted and sentenced, the State will not discuss the facts of the case in detail.

Suffice to say the State's evidence established that during the early morning hours of April 11, 1975, Chambers and several accomplices abducted the deceased and his female date and robbed them. The couple was then transported by automobile to the levy of the Trinity River

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knowingly causes a death of an individual") and "the person intentionally commits the murder in the course of committing or attempting to commit . . . robbery . . . ".

[4] TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon Supp. 1983) required a separate sentencing proceeding in a capital murder case. Article 37.071(b) required the submission of two (or three) special punishment issues (the issue of provocation needed to be submitted only when raised with the evidence). Article 37.071(e) required the trial court to return a sentence of death if the jury returned affirmative findings on each special issue submitted to it.

in Dallas and the couple was forced into the river bottoms at gunpoint. Both young people were then shot from behind by Chambers. When this failed to cause the immediate death of either of the intended victims, Chambers then used the butt of a shotgun to beat the deceased to death by striking the deceased in the head with the shotgun until the deceased's skull was fractured to the point that brain tissue was exposed. A similar attack was then perpetrated on the young female victim, however, she survived and testified against Chambers at his trials.

Chambers first conviction of the offense of capital murder was reversed and the indictment was returned to the convicting state district court for retrial.

The jury for the retrial (the instant case) was selected during November and December of 1985 in a voir dire procedure conducted under the supervision of a retired state district court judge. The trial on the merits was held on December 12-19, 1985, before the regular judge of the district court.

In his resulting appeal, Chambers challenged the prosecutors' exercise of three of the State's fifteen allotted peremptory challenges against three black female veniremen. Chambers is black. Chambers based his attack upon his conviction upon this Court's opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986).[5]

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[5] At the time of this trial and until this Court handed down its opinion in *Batson v. Kentucky*, the holdings of the Texas Court of Criminal Appeals had followed the lower Federal courts' interpretation of this Court's ruling in *Swain v.*

(Continued on following page)

Although Chambers took the position on appeal that the record on appeal, as it existed on direct submission, supported a reversal of his conviction on *Batson* grounds, on initial submission to the Court of Criminal Appeals this position was rejected by that court. The appeal of the case was ordered abated and the case was remanded to the trial court "for further proceedings not inconsistent with this opinion and *Batson*." *Chambers*, 742 S.W.2d at 696. The trial court was also ordered to forward the record of the retrospective *Batson* hearing and its findings of fact and conclusions of law regarding the *Batson* issues to the Court of Criminal Appeals.

On March 3, 1988, the retired trial judge who had presided over the jury selection portions of Chambers' trial conducted the retrospective *Batson* hearing mandated by the Court of Criminal Appeals. After it had been established by means of judicial notice that three black venirewomen had been excluded by the State's peremptory challenges, that Chambers was himself black, and that Chambers had been tried by an all white jury, the trial judge ruled that a prima facie case of purposeful discrimination had been established by Chambers.

Thereupon, the prosecutor who had been the senior member of the pair of prosecutors that had conducted the

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Alabama, 380 U.S. 202 (1965), insofar as those cases had held that an accused could not attack the exercise of the State's peremptory challenges without demonstrating systematic exclusion of minority veniremen by the State over a period of time. *E.g., Williams v. State*, 682 S.W.2d 538 (Tex. Crim. App. 1984).

jury selection for the State, Paul Macaluso, was called as a witness by the State. He testified that he had very little present recollection of the jury voir dire (which had occurred 27 months before the retrospective *Batson* hearing) and had virtually no recall of any of the three black venirewomen in question. He had, however, reviewed the written jury questionnaire forms (filled out prior to voir dire by each veniremen) of each of the three black venirewomen in question, as well as the actual voir dire questioning of each of these venirewomen. Based upon this review, Macaluso testified he would not have let any venireman who had expressed reservations about the death penalty similar to the reservations expressed by the black venirewomen in question sit on a capital murder jury. He then expressed the opinion that the venirewomen in question had been peremptorily challenged by the State because of their expressed reservations about the death penalty.[6] This opinion was based on Macaluso's jury selection practices which he had developed in the many capital murder prosecutions in which he had participated over a period of some years. Macaluso denied any race-based motives had informed his exercise in the State's peremptory challenges in this, or any other case. Feeble attempts at impeachment of Macaluso proved unsuccessful.

Chambers presented no testimony in his behalf.

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[6] The precise nature of the venirewomens' answers supporting the race neutral explanations offered by the prosecutor at the retrospective *Batson* hearing are detailed at p. 17, *infra*.

After briefing by the parties and submission to the trial court judge of proposed findings of fact and conclusions of law, the judge reconvened the proceedings on May 6, 1988, and announced rulings favorable to Chambers. The complete record was then forwarded to the Court of Criminal Appeals.

On June 28, 1989, the Court of Criminal Appeals delivered its unpublished, per curiam opinion rejecting the initial approach taken by the trial court judge, ordering a reconsideration of its findings of fact and conclusions of law, and abating the appeal to the trial court. While the initial findings of fact and conclusions of law are contained in the appendix of the Court of Criminal Appeals opinion of June 28, 1989, (Appendix pp. 31-39), these will not be discussed in detail here. Suffice it to say that the Court of Criminal Appeals held that under Texas law the trial court was required to consider the prosecutor's testimony regarding his habitual jury selection practices.

The salient point to be made, in light of the subsequent rulings of the trial court, is that at no time, either during the retrospective hearing or in Chambers' brief to the trial court, did Chambers maintain that the prosecutor's race neutral reasons were either unclear or lacking in specificity. Likewise, the trial court's **initial** findings of fact and conclusions of law, while holding the prosecutor's expressed reasons for the exercise of the State's peremptory challenges were "too speculative" to constitute "clear unreasonably specific reasons," reached this

conclusion purely because the prosecutor's lack of present recollection of the venirewomen in question,[7] rendered his opinion "speculative", not because the court did not understand the reasons given by the prosecutor.

After receiving the Court of Criminal Appeals opinion of June 28, 1989, the same retired trial court judge who had presided over the voir dire and the retrospective *Batson* hearing entered new findings of fact and conclusions of law on July 18, 1989.[8] These findings and conclusions were forwarded to the Court of Criminal Appeals which adopted them by reference in its opinion of October 25, 1989. It is from this opinion of October 25, 1989 that the State now seeks relief. The findings and conclusions of the trial court of July 18, 1989 are remarkable in many respects.

However, two points require mention here:

First, the trial court's Conclusion of Law No. 2 held that the State failed to rebut the prima facie case of purposeful discrimination made out by Chambers because the State "failed to establish a 'clear and reasonably specific' racially neutral explanation for the exercise of the" State's peremptory challenges against the three

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[7] As noted above, Court of Criminal Appeals opinion of June 28, 1989, rejected this approach, holding that testimony concerning habitual jury selection practices is admissible under the Texas Rules of Criminal Evidence. Chambers did not contest this holding.

[8] No further proceedings were had in trial court. These findings are contained in the appendix to the Court of Criminal Appeals opinion of October 25, 1989 which begins at p. 1 of the Appendix to this petition.

black venirewomen in question. However, nowhere in the otherwise complete six preceding pages of fact findings does the trial court enumerate or even refer to the nature of the explanations that had been offered by the prosecutor at the hearing. The State finds it odd that no fact findings were made concerning the particular facts that bore directly on the legal analysis used to support the trial judge's Conclusion of Law No. 2.

Second, Findings of Fact Nos. 14, 15, 22, 23 and 24, when read conjunctively, suggest that the trial court never did actually reconsider its initial rulings that the prosecutor's race neutral reasons were unacceptable because prosecutor lacked present recollection of the veniremen at the time he testified at the retrospective *Batson* hearing. In its opinion of October 25, 1989, the Court of Criminal Appeals, after reviewing the procedural history of the appeal, simply attached the trial court's findings of fact and conclusions of law to the opinion, incorporated these "by reference", and ordered Chambers' conviction reversed without any further analysis. Despite the extensive briefing on the issue of the nature of a "clear and reasonably specific" explanation which was contained in the State's motion for rehearing, that motion was refused without additional discussion by the court.

REASONS FOR GRANTING THE WRIT

I.

The Court of Criminal Appeals holding has critical importance to the interpretation of *Batson* and if left undisturbed the holding will severely undermine the public's confidence in the criminal justice system.

This Court's opinion in *Batson v. Kentucky* has had an enormous impact on the jury selection practices in criminal trials, not only in Texas, but throughout the nation. Although Justice Powell expressed confidence in the ability of trial court judges to implement this Court's holding in *Batson* without the benefit of a more particular formulation of procedures which were to be followed in a Batson hearing, *Batson*, 476 U.S. at 97-99, as this case, requiring two abatements of the appeal to the trial court for purposes of resolving *Batson* questions, illustrates, many trial and some appellate courts appear to have become lost in the "morass"[9] created by this Court's opinion in *Batson*. Our over-burdened criminal justice system can ill-afford to have the already lengthy hearings on *Batson*-related issues unnecessarily prolonged by lack of clear guidance from this Court concerning the precise nature of the basic elements of a *Batson* complaint. While this Court's *Batson* majority sought to **enhance** "public respect for our criminal justice system,"[10] public respect for the criminal justice system is **seriously eroded** when the otherwise correct verdicts of juries in important

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[9] See dissenting opinion of Chief Justice Burger in *Batson*, 476 U.S. at 131.

[10] *Batson*, 476 U.S. at 99.

criminal cases are reversed when key provisions of this Court's opinion in *Batson* are inaccurately applied by bewildered trial judges whose incorrect legal decisions are shielded from appellate review by misplaced notions of due deference for the trial court's factfinding functions. It is difficult to explain to the general public or to the victims of criminal activity why it is improper for a prosecutor to exercise peremptory challenges in a capital murder jury selection process against veniremen who have clearly expressed reservations about the death penalty.

II.

The holding below is inconsistent with this Court's opinion in *Batson*.

Indeed, the State believes that nothing in *Batson* requires the result reached here which, if allowed to stand, will substantially reduce the ability of prosecutors to exercise peremptory challenges against veniremen who have expressed reservations about the death penalty and happen to share racial identity with the accused. In *Batson*, this Court stated that the prosecutor's explanations of the exercise of the state's peremptory challenge necessary to rebut a prima facia case of purposeful discrimination "need not rise to the level justifying a challenge for cause," 476 U.S. at 97, yet in the instant case, the prosecutor's expressed reasons arguably rose to at least the level required to justify a challenge for cause, yet the Texas courts applied *Batson* in a manner that rendered the prosecutor's explanations futile.

III.

Clarification of the meaning of the phrase "clear and reasonably specific" explanation has not been provided by the lower courts.

The issue of what reasons for the exercise of the state's peremptory challenges can constitute "clear and reasonably specific" explanations of "legitimate reasons" for exercising peremptory challenges was raised by the dissenters in *Batson*. 476 U.S. at 127. Subsequent opinions of the lower federal courts, the appellate courts of our sister states, and courts in Texas' own appellate court system have provided little concrete guidance as to the practical meaning of this crucial phrase.

The instant case presents an excellent vehicle for the explanation of the phrase "clear and reasonably specific" inasmuch as the Texas courts ordered Chambers' conviction reversed **solely** because of their determination that the prosecutor's explanations for the exercise of the State's peremptory challenges did not, **as a matter of law**, constitute "clear and reasonably specific" reasons for the exercise of those challenges. Thus, this case is not clouded by any doubts about the credibility of the prosecutor[11] or factual determinations by the trial court based on or related to attempts to impeach the prosecutor.

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[11] The State recognizes that a trial court's determinations concerning the credibility of the prosecutor are fact-findings, entitled to great deference by the appellate courts. *Batson*, 476 U.S. at 98, n. 21. In the instant case, however, the trial court stated that it believed the prosecutor had been truthful.

IV.

The holding of the Texas courts in the instant case that the reasons for the exercise of the State's peremptory challenges given by the prosecutor were not sufficiently "clear and reasonably specific" is contrary to this Court's previous interpretations of the meaning of this phrase in Title VII cases.

The State believes that the level of clarity and specificity of a prosecutor's explanation must be directly related to the function that such an explanation properly has at a *Batson* hearing. This conclusion finds support in the language found in this Court's opinion in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Title VII case from which Justice Powell borrowed not only the concept of "clear and reasonably specific" explanations of the prosecutor's "legitimate reasons," *Batson* 476 U.S. at 98, n. 20, but virtually all of the other components of the *Batson* analysis as well. In *Burdine*, Justice Powell explained that the employer-defendant must rebut a prima facie case of discrimination by "explaining clearly the non-discriminatory reasons for its actions." *Burdine*, 450 U.S. at 260. The explanations "need not persuade the court that it (employer) was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Rather, it is sufficient if the employer's explanation "raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.*

"Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issues with sufficient clarity so

that the plaintiff will have a full and fair opportunity to demonstrate pretext.[12] The sufficiency of the defendant's evidence should be evaluated by the extent that which it fulfills these functions." *Burdine*, 450 U.S. at 255-256.

V.

The reasons given for the exercise of the State's peremptory challenges in the instant case were clear, specific, and related to the State's legitimate goal of selecting veniremen who could consider voting to support a verdict that would result in the imposition of a sentence of death.

Turning to the reasons assigned by the prosecutor in the instant for striking the three black females in question, the record on appeal clearly established the following:

1) That all of the veniremen in the instant case were required to fill out an 8 page jury questionnaire form consisting of 60 questions, prior to voir dire. The prosecuting attorneys reviewed the completed questionnaires prior to the commencement of the individual voir dire

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[12] The Texas courts have adopted the multi-factored test for assaying claims that the prosecutor's explanations for the exercise of the State's peremptory challenges were pretextual first enunciated by other state courts' post-Batson decisions. *See, Keeton v. State*, 749 S.W.2d 861,866 (Tex. Crim. App. 1988). In the instant case, the trial court failed to apply any of these factors. Instead, its analysis terminated with its conclusion that the prosecutor's explanations were not clear and reasonably specific.

examination of each veniremen.[13] Questions numbers 56-58 asked the veniremen about their personal feelings about the death penalty, inquiring as to whether the veniremen "believed in" the death penalty and whether any "moral, religious or personal beliefs" held by the veniremen would 1) prevent them from "returning a verdict which would ultimately result in the execution of another human being" or 2) prevent the veniremen from "sitting in judgement of another human being".

2) That the prosecutors closely examined all of the veniremen's written answers to the questions on the forms and paid especially close attention to answers to the three questions designed to elicit responses about the possible impact of the personal beliefs of the veniremen on their ability to return affirmative answers to the special punishment issues in a capital murder case (hereinafter referred to as "death penalty-specific questions").

3) That whenever a venireman's written answers to the death penalty-specific questions suggested that further examination of that venireman on the subject of

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[13] In a Texas death penalty case the veniremen on the jury panel are briefly examined as a group by the trial court. Each venireman is then subjected to individual questioning by the attorneys which is conducted separately from the rest of the jury panel. At the conclusion of the examination of each venireman, if the venireman has not been disqualified or successfully challenged for cause, the venireman is submitted to the parties for exercise of peremptory challenges, first to the State, then if necessary to the defense. See relevant articles of the Texas Code of Criminal Procedure set out in Appendix at p. 40.

personal opinions about the death penalty might be warranted, the prosecutors questioned the particular venireman on this issue during individual voir dire.

4) That each of the three black venirewomen excluded by the State in the instant case answered at least some of the three death penalty-specific questions in ways that caused the prosecutors to examine each of these venirewomen closely on the issue of their personal beliefs about the death penalty.

Venirewoman Harrison's questionnaire stated that she did not believe in the death penalty and she did not feel that she had "the right to take anyone's life from them." She also answered "yes" to the question about the existence of personal beliefs that might prevent her from returning a verdict that could result in the death of another human being.

Venirewoman Rook's questionnaire stated that she did not believe in the death penalty, but her written answer demonstrated at least qualified support for capital punishment. However, she left one of the other death penalty-specific questions unanswered.

Venirewoman Johnson stated on her jury questionnaire form that she did not believe in the death penalty and would oppose it unless she had personally witnessed the defendant commit the murder. She indicated that her personal beliefs would prevent her from returning a verdict resulting in the death of another human being.

5) That the lead prosecutor had not and would not accept any venireman on a death penalty jury who had given answers expressing reservations about the death

penalty which were similar to those answers given by the three black venirewomen in question.

6) Without detailing here the responses given by each of the black venirewomen in question during individual voir dire, suffice it to say that there was nothing in the answers given by the venirewomen in question during voir dire which were sufficient to assuage the prosecutors' initial concerns that each of the three venirewomen in question were either affirmatively opposed to the death penalty or reluctant to vote to return a verdict with affirmative answers to the special issues on punishment knowing that such answers would result in the imposition of capital punishment. Indeed, the voir dire of two of the three revealed additional reasons, independent of the venirewomen's philosophic opposition to the death penalty, which also suggested to the prosecutor that these venirewomen were not ideal or even acceptable jurors from the State's perspective. However, the prosecutors' principal objection to each of the three venirewomen was their clearly expressed opposition to or reluctance to impose the death penalty.

7) That the prosecutors' expressed reasons for exercising the State's peremptory challenges against the three black venirewomen in question were clear enough to allow attempted impeachment of the prosecutor by the defense at the *Batson* hearing. The defense attempted to demonstrate that other veniremen had given answers to the death penalty-specific questions on the questionnaire which were similar to the answers given by the three black venirewomen but that these other veniremen were not challenged peremptorily by the State. Such efforts at impeachment proved unavailing when the defense could

not demonstrate that any of the other veniremen had been in fact presented to the State for acceptance or exercise of the State's peremptory challenge. Rather, each of these other veniremen had been excluded from jury service by agreement of the parties, disqualification, or challenge for cause.

VI.

This Court should grant this petition to determine whether *Batson*'s requirement of rebuttal of a prima facie case by a "clear and reasonably specific" explanation can be satisfied by opinion testimony based on evidence contained in the record and the prosecutor's habitual jury selection practices.

This case squarely presents the issue of whether a prosecutor may rebut a prima facie case of purposeful discrimination made out at a retrospective *Batson* hearing by applying his established jury selection practices to the recorded written and oral statements of the excluded veniremen made during the jury selection process. While, as noted above, the Court of Criminal Appeals initially held that such evidence must be considered by the trial court, it ultimately acquiesced in the trial court's refusal or failure to consider whether such testimony constituted a "clear and reasonably specific" explanation for the State's exercise of her peremptory challenges.

Given 1) the proper functions of a prosecutor's explanations (the narrowing of the factual issues and the facilitation of impeachment of the reasons given), 2) the absence of a requirement that the "clear and reasonably specific" reasons actually persuade the trial court that the reasons given actually constituted the true reasons for the

exercise of the peremptory challenges in question, and 3) the fact that at retrospective *Batson* hearings involving cases tried before the delivery of this Court's opinion in *Batson* such opinion testimony may constitute the best or only explanations available to the State, the State believes that there is no logical or practical reason for *Batson*'s requirement of "clear and reasonably specific" explanations to be interpreted as requiring present recollection of the veniremen in question by the prosecutor at a retrospective *Batson* hearing. The requirement of present recollection is especially inappropriate where the record on appeal clearly reflects the excluded veniremen's inability to fairly consider imposition of the punishment sought by the State and that inability was a legitimate reason for the exercise of the State's questioned peremptory challenges.

CONCLUSION

For the various reasons outlined above, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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RONALD CURTIS CHAMBERS, Appellant

NO. 69,609 vs.

DIRECT APPEAL FROM DALLAS COUNTY

THE STATE OF TEXAS, Appellee

OPINION FOLLOWING REMAND FOR RETROSPECTIVE BATSON HEARING

A jury found Ronald Curtis Chambers, henceforth appellant, guilty of capital murder and the jury answered the submitted special issues in the affirmative. The trial judge thereafter assessed his penalty at death.

On direct appeal, see *Chambers v. State*, 742 S.W.2d 695 (Tex.Cr.App. 1988), although appellant presented thirteen points of error, this Court limited its discussion to the issues that concerned this pre-*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), case. *Batson* is to be applied to similarly situated cases. See *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Also see *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). *Batson* concerns the prosecutor's use of peremptory strikes to remove members of the defendant's race from serving as jurors for race-related reasons.

This Court decided in this cause that the proper thing to do, given the state of the record, was to abate the appeal to the trial court with instructions to the trial court to conduct further proceedings not inconsistent with his opinion and *Batson*. The trial court was to then forward the record of that hearing to this Court. See *Chambers v. State*, supra.

The trial judge carried out his duty in part and conducted a hearing on the "Batson" issue. However, after the record was returned to this Court, we found that the trial judge erred in refusing to consider the testimony of the prosecutor who testified at the hearing in deciding whether the State had a valid race-neutral explanation for its exercise of the peremptory strikes at issue.

In an unpublished opinion, see *Chambers v. State*, No. 69,609, June 28, 1989, we again abated the appeal so that the trial judge could reconsider his former "Findings of Fact and Conclusions of Law," and then forward same to this Court in a supplemental transcript. That has occurred.

In order not to unnecessarily elongate this opinion, and finding that the trial judge's findings of fact and conclusions of law are supported by the record, we will attach same to this opinion and incorporate same by reference.

Accordingly, we reverse the judgment of the trial court and remand this cause to the trial court for proceedings not inconsistent with this opinion.

TEAGUE, Judge

Presiding Judge McCormick, since he does not believe that the standard of review in cases such as this one, should be that of "supported by the record," he only concurs in the result. Judges Davis, Campbell, White, and Berchelmann only concur in the result.

EN BANC

DELIVERED: October 25, 1989

PUBLISH

APPENDIX "A"

NO. 69,609

RONALD CURTIS CHAMBERS	) ON REMAND FROM THE
	) COURT OF CRIMINAL
V.	) APPEALS IN THE
	) CRIMINAL DISTRICT
THE STATE OF TEXAS	) COURT NO. 4 OF DALLAS
	) COUNTY, TEXAS, IN
	) CAUSE NO. F85-99385-PK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed July 20, 1989)

On January 6, 1988, the Court of Criminal Appeals remanded the above-styled and numbered cause to the Criminal District Court No. 4 of Dallas County, Texas, with instructions to hold a hearing to determine the reasons for the State's exercise of peremptory challenges against members of the Appellant's race, and thereafter, to file with the Court of Criminal Appeals relevant Findings of Fact and Conclusions of Law. On March 3, 1988, a hearing was held in the Criminal District Court of Dallas County, Texas, the Honorable Tom Ryan, Judge, sitting for the Honorable Francis Maloney, Judge Presiding. All parties appeared in person and/or by counsel. After evidence offered by the parties and arguments thereon, the

Court made findings of fact and conclusions of law which were filed in this cause on April 14, 1988.

Thereafter, the Court of Criminal Appeals, in a *per curiam* order, again abated this cause and remanded to this Court with instructions to clarify its prior Findings of Fact and Conclusions of Law, and in response thereto, the Court now makes the following Findings of Fact and Conclusions of Law:

I.

FINDINGS OF FACT

1. The Appellant, Ronald Curtis Chambers, is a black man. (Tr.-9).[1]

2. The Appellant had, prior to trial in this cause, filed a pre-trial motion asking that the State be prohibited from exercising peremptory strikes on members of his race for the reason that they too were black. (R.I- 37).

3. Prior to the beginning of the *voir dire*, and pursuant to the Appellant's pre-trial motion, it was agreed that the race of each potential juror would be reflected in the appellate record by having the court reporter note in the record the race of each potential juror. (R.I- 37; R.IV-46).

---

[1] Throughout these Findings of Fact and Conclusions of Law, the transcription of the proceedings had at the hearing on remand held on March 3, 1988, shall be referred to as "Tr.-". References to portions of the appellate record which were judicially noted for the purposes of this hearing shall be referred to as required by TEX. R. APP. PROC. APPENDIX FOR CRIMINAL CASES, RULE 1.

4. During the Court of *voir dire*, sixteen (16) black potential jurors were called for consideration. Of these, eleven (11) were excused upon challenge for cause by the State pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.16 (1965). (R.IV- 42, 44; R.VI- 62, 98; R.VII- 92, 99-100; R. XIV- 8; R.XVIII- 181; R.XXI- 93; R.XXII- 16; R.XV- 46; R.XV- 79; R.XVI- 109; R. XVII- 231; Tr.- 12).

5. Of the remaining five potential black jurors, one, Mrs. Thelma Sanders Clardy, was excused by the parties by agreement (R.VI- 99-101). The record is silent as to the reason for this agreement.

6. A second black potential juror, Ms. Ethel R. Tennell, was excused upon her claiming of a statutory exemption. (R.XV- 80; Tr.- 12). TEX. CODE CRIM. PROC. ANN. art. 35.04 (1965).

7. The remaining three (3) black potential jurors, Norrette Cereese Johnson, Loretta B. Rooks and Sandra A. Harrison, were all excused when the State exercised a peremptory challenge on each pursuant to TEX. CODE CRIM. PROC. ANN. arts. 35.15 *et. seq.* (1965). (R.VI- 28; R.IX- 68; R.XIV- 36; Tr.- 12).

8. In the case of both Ms. Rooks and Ms. Harrison, the exercise of a peremptory followed the State's unsuccessful efforts to have the potential juror struck for cause. (R.IX- 53; R.XIV -24).

9. In each instance where the State exercised a peremptory challenge to excuse a black potential juror, the Appellant objected to the use of a peremptory strike to excuse the juror, asked that the prosecutor be examined on the issue of use of peremptory strikes to excuse

black jurors, and, as a proffer to justify the request to be allowed to examine the prosecutor on the exercise of the strike, advised the trial court that if permitted to question the prosecutor, the Appellant believed that he could establish that the veniremen were stricken due to their race. (R.VI- 38-39; R.IX- 68-68; R.XIV- 36-37). This Court refused to permit the prosecutor to be examined on this issue. The Appellant's proffers that he expected the examinations to establish that the strikes were racially motivated were not challenged by the State.

10. Mr. Paul Macaluso, who at the time of the trial was an Assistant District Attorney for Dallas County, Texas, exercised the State's peremptory challenge against juror Harrison. (R.XIV- 24).

11. Mr. Andy Beach, and Assistant District Attorney for Dallas County, Texas, exercised the State's peremptory challenge against jurors Rooks and Johnson. (R.VI- 28; R. IX- 68).

12. In addition to the black potential jurors stricken by the State peremptorily, the State successfully challenged two black potential jurors (Thomas Johnson & Sharon E. Curtis) and unsuccessfully attempted to challenge a third potential black juror (Loretta Rooks) on the basis that they would not consider the *minimum* punishment in the event that the Appellant was convicted of the lesser included offense of murder. (R.XVIII- 146-181; R.XIV- 47-49; R.VI- 9-69). The State made no corresponding effort to challenge potential white jurors on the basis of their willingness to consider the minimum punishment for a lesser included offense.

13. The State called one of the two prosecutors who conducted part of the *voir dire* in this cause, Paul Macaluso. Mr. Macaluso expressly stated that due to the passage of time since the trial of this cause, he could not remember these jurors, and more specifically, he could not recall why he exercised peremptory strikes to eliminate these black jurors from the Appellant's jury. (Tr.-45, 51, 59, 71, 80-81, 87-88, 94-95, 96, 125-128).

14. Mr. Macaluso testified that although he could not remember why he struck the jurors at issue, he had, prior to the hearing on March 3, 1988, reviewed the transcription of the *voir dire* proceedings regarding the three jurors stricken and their respective juror questionnaires. (Tr.- 33-34). He then testified, over objection, that *in general* he found certain answers in the *voir dire* and the juror questionnaires which were of such a nature as would, in most, if not all cases, result in his striking similarly situated jurors in other trials.

15. Mr. Macaluso did not testify from a refreshed recollection after reviewing the materials from the original trial. Though he reviewed the materials, they did not refresh his independent recollection, (Tr.-45, 51, 59, 71, 80-81, 87-88, 94-95, 96, 125-128); he was not speaking from memory thus revived. He had no personal knowledge concerning anything which happened at the trial at issue at the time that he testified at this hearing.

16. Mr. Macaluso testified that he had never stricken a potential juror solely on the basis of race. (Tr.-51, 67, 78).

17. Mr. Macaluso did not exercise all of the strikes at issue, although he did profess to have some input into the decision to strike the juror. (Tr.- 90-93).

18. Mr. Beach was available to testify, however, he was never called by the State. (Tr.- 7-8).

19. The State's *voir dire* questions of members of the accused's race were in no way distinctive, nor did they elicit any information which would, on its face, justify the use of a peremptory challenge on the jurors.

20. The State exercised its peremptory strikes to exclude all members of the accused's race from the jury who were not successfully challenged for cause by the State. As a result, the Appellant, a black man, was tried by an all white jury. (Tr.- 18).

21. All of the testimony and evidence proffered by the parties at the hearing March 3, 1988, was admitted into evidence for purposes of the hearing.

22. All of the evidence admitted at the hearing was "considered" by the Court in reaching its conclusions and in preparing its heretofore filed Findings of Fact and Conclusions of Law.

23. Specifically, the testimony of Paul Macaluso was both admitted into evidence and "considered" by the Court.

24. After considering all of the evidence admitted at the hearing, and after evaluating the credibility of the witness and giving due weight to the evidence proffered by the State, the Court was, and still is, of the opinion that the State has failed to meet the "clear and reasonably specific" criteria constitutionally necessary to rebut the

Appellant's *prima facie* case of racially discriminatory exercise of peremptory strikes by the State.

II.

CONCLUSIONS OF LAW

1. The Appellant established a *prima facie* case of racially discriminatory exercise of peremptory strikes by the State. See: *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *Tompkins v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 68,870 delivered 10/7/87); *Whitesey v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 1121-87 delivered May 10, 1989).

2. The State has failed to rebut the Appellant's *prima facie* case of purposeful racial discrimination as to each of the three black jurors on who it exercised peremptory challenges since the State has failed to establish a "clear and reasonably specific" racially neutral explanation for the exercise of the aforesaid strikes. See: *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *Tompkins v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 68,870 delivered 10/7/87); *Whitesey v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 1121-87 delivered May 10, 1989).

SIGNED this 18th day of July, 1989.

/s/ Tom Ryan
Judge Presiding

RONALD CURTIS CHAMBERS, Appellant

NO. 69,609 VS. APPEAL from DALLAS County

THE STAT OF TEXAS, Appellee

OPINION FOLLOWING REMAND FOR RETROSPECTIVE BATSON HEARING

Ronald Curtis Chambers, henceforth appellant, was convicted of capital murder and assessed the death penalty. On direct appeal to this Court, appellant asserts that he has been denied a fair trial and equal protection of the law under the Fourteenth Amendment. This claim arises from the prosecutor's use of peremptory strikes to remove three black individuals from the jury panel, leaving appellant, a black male, to be tried by an all-white jury. Appellant relies on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986), claiming that the prosecutor's peremptory strikes were racially motivated.

In *Batson*, the Supreme Court held that a minority defendant may prove a case of racial discrimination in the selection of the petit jury based entirely upon the facts of the voir dire in that cause. The Supreme Court stated:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the

> prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.
>
> * * *
>
> Once the defendant makes a prima facie showing the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race . . . Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirming his good faith in individual selections." The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

Id. at 1723-24 (citations omitted).

Batson was decided on April 30, 1986. The jury in this cause was selected in November and December, 1985, and this cause was pending on appeal to this Court at the time of the *Batson* decision. *Batson* has been applied to similarly situated cases pursuant to *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Also see

Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986).

Since the trial court did not have the benefit of the *Batson* opinion at the time that this cause went to trial, on original submission this Court remanded appellant's case to the trial court with orders that a hearing be conducted to determine the merits of appellant's *Batson* claim. The trial judge was ordered to compose findings of fact and conclusions of law on the basis of that hearing and forward them to this Court along with the record of those proceedings. *Chambers v. State*, 742 S.W.2d 695 (Tex.Cr.App. Jan.6,1988).

On March 3, 1988 the trial judge, who was the same trial judge who presided over the original jury selection process, but not the trial of this cause, conducted the retrospective *Batson* hearing as ordered by this Court, and on May 6, 1988 the trial judge announced his ruling on the merits of appellant's *Batson* claim and ruled favorably to appellant. The complete record of the hearing has now been forwarded to this Court. By way of introduction, we will briefly note some of the significant facts educed at that proceeding.

During jury selection in the instant cause, in November and December of 1985, sixteen black individuals were included on the jury panel. Of these, eleven were excluded on the basis of the State's challenges for cause. One claimed a statutory exemption, and another was excused by mutual agreement of the parties, though the record is silent as to the basis for that agreement. The remaining three black venirepersons, Loretta B. Rooks, Sandra A. Harrison, and Norrette C. Johnson, were

excused on the basis of peremptory challenges exercised by the State. Appellant was tried by an all-white jury.

The trial record reflects that in each instance where the State exercised a peremptory strike to excuse a black potential juror appellant objected to the use of the peremptory challenge. Appellant then requested that the prosecutor be examined as to the motives behind his use of the peremptory strike. Furthermore, as a proffer to justify this request, appellant advised the trial judge that he believed that he could, if permitted to question the prosecutor, establish that each venireperson was stricken due to her race. These requests by appellant were denied in each of the three instances at issue here. The race of each venireperson was noted in the record, pursuant to an agreement of the parties arrived at prior to the commencement of voir dire. We find that any *Batson* error was effectively preserved for review. See *Chambers*, at 696.

Apparently based on these facts the trial judge first found orally and then put in writing his conclusions of law that appellant had established "a prima facie case of racially discriminatory exercise of peremptory strikes by the State." The State does not dispute this finding. See State's Supplemental Brief at p.5. Since the trial judge found that a prima facie case had been established, the burden shifted to the State to come forward with race-neutral explanations for the three peremptory strikes exercised against black venirepersons.

We now turn to the trial judge's findings that concern the explanations that Hon. Paul Macaluso, the only prosecutor who testified at the hearing, gave.

Having reviewed Macaluso's testimony at the retrospective *Batson* hearing, we are in agreement with the trial judge's summary of Macaluso's testimony in his "Findings of Fact"[1], from which we quote the following. We have taken the liberty of correctly spelling Macaluso's last name. The trial judge, in his findings, erroneously spelled it "Macalusco". Macaluso, with Hon. Andy Beach, prosecuted this cause for the State. Beach did not, however testify at the "Batson" hearing.

> 13. The State called one of the two prosecutors who conducted part of the voir dire in this cause, Paul Macaluso. Mr. Macaluso expressly stated that due to the passage of time since the trial of this cause, he could not remember these jurors, and more specifically, he could not recall why he exercised peremptory strikes to eliminate these black jurors from the Appellant's jury.
>
> 14. Mr. Macaluso testified that although he could not remember why he struck the jurors at issue he had, prior to the hearing on March 3, 1988, reviewed the transcription of the voir dire proceedings regarding the three jurors stricken and their respective juror questionnaires. He then testified, over objection, that *in general* he found certain answers in the voir dire and the juror questionnaires which were of such a nature as would, in most, if not all cases, result in his striking similarly situated jurors in other trials.

---

[1] We attach to this opinion as "Appendix A" a copy of the trial judge's Findings of Fact and Conclusions of Law, as well as his oral statements that pertain thereto.

15. Mr. Macaluso did not testify from a refreshed recollection after reviewing the materials from the original trial. Though he reviewed the materials, they did not refresh his independent recollection; he was not speaking from memory thus revived. He had no personal knowledge concerning anything which happened at the trial at issue.

16. Mr. Macaluso testified that he had never stricken a potential juror solely on the basis of race.

17. Mr. Macaluso did not exercise all of the strikes at issue, although he did profess to have some input into the decision to strike the juror.

Based upon his review of this testimony, the trial judge adopted, among others, the following "Conclusions of Law":

2. The testimony of Mr. Macaluso that he had not stricken juror Harrison for racial reasons will not rebut the Appellant's prima facie case.

3. The testimony of Mr. Macaluso was not based upon a refreshed recollection.

4. The testimony of Mr. Macaluso was not based upon personal knowledge.

6. The testimony of Mr. Macaluso concerning his general practice in striking jurors in other cases is too speculative to constitute a "clear and reasonably specific" racially neutral explanation as to why he struck juror Harrison.

7. The testimony of Mr. Macaluso will not establish why a different prosecutor, Mr. Beach, struck jurors Rooks and Johnson.

8. The State offered no reason why it struck two black jurors, Rooks and Johnson, peremptorily.

9. The State has failed to adequately rebut Appellant's prima facie case of purposeful racial discrimination as to each of the three black jurors on who [sic] it exercised peremptory challenges.

[Citations omitted.]

Furthermore, the trial judge commented upon the reasoning behind his ruling when he announced that ruling in court:

MR. KECK: [Counsel for the State]: Judge, could – could I ask you to just state one (1) thing for purposes of the record?

THE COURT: Yes, sir.

MR. KECK: – So it's clear. The basis of your ruling is that you refuse to consider Mr. Macaluso's testimony on the basis that he couldn't state that he had a present recollection of the reasons –

THE COURT: Yes, sir.

MR. KECK: – That he had – that he used.

THE COURT: – That's one (1) of the reasons; but Mr. Macaluso testified – he's very articulate – and he was the first to admit that he had no independent recollection; all he did was read the prior record; and that didn't really help him. It – it was more of a hypothetical situation, "Judge, if this had occurred, this is what I would have done . . . "

* * *

MR. KECK: Yes, Sir. I understand; but – but if – if it'd just been a – less time and for – for

> whatever reason you'd found his testimony credible in that regard – I guess what I'm trying to clarify is: It's – it's the fact that it was all hypothetical that – that has led you to this whole thing?
>
> THE COURT: Two (2) facts – that's one (1). The other is the absence of Mr. Beach because Mr. Macaluso testified indirectly to Mr. Beach's thought processes; and he was here; and it could have made a big difference. He might have had some independent recollection.

Based on the record of the retrospective *Batson* hearing, it is our understanding that the trial judge found Macaluso's testimony to be inadmissible as a matter of law (see, e.g., trial judge's reference to Rule 602, Texas Rules of Criminal Evidence). Apparently based on this conclusion, the trial judge, having already allowed Macaluso to testify as to his general practices in voir dire, refused to consider Macaluso's testimony in determining the merits of appellant's *Batson* claim. We will overrule the trial judge's decision not to consider this evidence.

Given the nature of the trial judge's ruling, it is important to note that Rule 402, Texas Rules of Criminal Evidence, states generally that all relevant evidence is admissible. Furthermore, Rule 401 defines relevant evidence as follows:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 406 goes on to state:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

On the basis of these statutes, it is our opinion that Macaluso's testimony as to his customary or habitual voir dire strategies (as they related to the facts of this case) was admissible, unless otherwise restricted, because it was relevant to prove that the strikes in question were exercised in accordance with those strategies. See Rule 406, Tex.Rules of Criminal Evidence. Also see and compare *Webster v. Estelle*, 505 F.2d 926, 930 (5th Cir. 1974). Furthermore, because those strategies were described by Macaluso in terms of the motives which conditioned them, any testimony regarding the nature of those strategies or the likelihood of his adherence to them was directly relevant to the inquiry about the motives behind the particular challenges exercised in this case. Because we find that Macaluso's testimony was relevant, and therefore admissible unless otherwise restricted, we will now proceed to a discussion of the reasons suggested by the trial judge in his "Conclusions of Law" for refusing to consider that testimony.

In his Conclusion of Law Number 4, which states that Mr. Macaluso's testimony was not based upon personal knowledge, the trial judge refers to Rule 602, Texas Rules of Criminal Evidence, which reads:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a

> finding that he has personal knowledge of the matter.

Given statements in the record, it is highly unlikely that the trial judge doubted Macaluso's personal knowledge of his customary practices in conducting voir dire proceedings. Given this, we can only take the trial judge's reference to Rule 602 to mean that Macaluso's testimony was inadmissible because he testified without personal knowledge of the specific jurors and peremptory challenges at issue in this cause. The record completely supports the trial judge's conclusion that Macaluso lacked personal knowledge of those specific jurors on whom he exercised peremptory strikes.

However, we would point out, as does the State in its "Supplemental Brief", that the "matter" to which Macaluso testified is none other than his customary manner of proceeding during voir dire, and not the specific events that occurred at appellant's trial. The record reveals numerous instances of testimony where references were made to Macaluso's background as a prosecutor, and his "habits" in voir diring venirepersons, see Rule 406, Texas Rules of Criminal Evidence, which would constitute evidence sufficient to establish his personal knowledge of his voir dire strategies. As a result, we do not find that Macaluso's lack of personal knowledge is a viable basis for the trial judge's refusal to consider his testimony.

The trial judge's Conclusion of Law Number 6 suggests another possible rationale behind his refusal to consider Macaluso's testimony:

> "The testimony of Mr. Macalusco [sic] concerning his general practice in striking jurors in

> other cases is too speculative to constitute a 'clear and reasonably specific' racially neutral explanation . . . "

The judge's remarks in announcing his ruling, see *ante*, further indicate that the judge was troubled by the "hypothetical" nature of Macaluso's testimony; they also indicate that this was one of the "facts" which led the judge to disregard that testimony.

Conclusion of Law Number 6 cites *Batson* at 1723-24, n.24. This appears to be an error, because footnote number 20, and not footnote number 24, is located at pp. 1723-24, and footnote number 20 contains the language of "clear and reasonably specific" explanations as it is used in the court's Conclusion of Law Number 6.

While we recognize *Batson*'s teaching that a prosecutor's explanation must be "clear and reasonably specific" in order to rebut a prima facie case of racial discrimination, we do not find any indication, either in the *Batson* opinion itself or elsewhere, that evidence presented by the prosecution in an attempt to rebut a prima facie case may not be considered unless it constitutes, in and of itself, a clear and reasonably specific racially neutral explanation. Justification for the trial judge's decision not to consider Macaluso's testimony simply does not exist in the case law relevant to *Batson* error. See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 450 U.S. 248, 67 L.Ed.2d 207 (1981) (Held, when an employee in sex discrimination case had proved a prima facie case of employment discrimination, the employer bore only the burden of explaining clearly the nondiscriminatory reasons for its actions and bore no burden of persuading the court by a preponderance of the evidence that legitimate,

nondiscriminatory reasons for the challenged employment action existed.); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979) (Held, jury in age discrimination case should have been instructed that employee was required to prove by preponderance of evidence that his age was determinative factor in discharge.); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (Held, in Title VII equal employment opportunity case, employer, which assigned complainant's participation in unlawful conduct against it as cause for his rejection, discharged its burden of proof to articulate legitimate, nondiscriminatory reason for complainant's rejection, but on remand complainant had to be afforded a fair opportunity to show that employer's stated reason for complainant's rejection was in fact pretextual.).

Our holding on this issue does not prohibit the trial judge from finding that Macaluso's testimony fails to meet the "clear and reasonably specific" criteria. Furthermore, if the trial judge should so find, then our holding will not inhibit in any way the trial judge's power to find, after considering all of the relevant evidence, that the State has failed to rebut appellant's prima facie case for lack of a "clear and reasonably specific" racially neutral explanation. We must reemphasize, however, that, pursuant to the Texas Rules of Criminal Evidence, *supra*, the State is entitled to have all relevant evidence considered by the trial judge in his determination of the merits of appellant's *Batson* claim.

We hold that once the trial judge has considered all of the relevant and admissible evidence before him, then the question of whether the prima facie case has been rebutted turns primarily upon issues of credibility and weight

of the evidence, issues which we have held to be within the province of the trial court as fact finder. See *Tompkins v. State*, (Tex.Cr.App., No. 68,870, October 7, 1987), affirmed by an equally divided Supreme Court, see *Tompkins v. Texas*, Supreme Court No. 87-6405, June 5, 1989. Also see *Whitsey v. State*, ___ S.W.2d ___ (Tex. Cr.App., No. 1121-87, May 10, 1989) (Pending on State's Motion for Rehearing).

Another apparent reason behind the trial judge's decision to disregard the testimony of Macaluso concerns Macaluso's testimony as to peremptory strikes exercised by Hon. Andy Beach, the other prosecutor at trial. At the retrospective *Batson* hearing, Macaluso and Beach were both present. However, for reasons not explicated in the record, only Macaluso testified.

While the record is clear that at trial Macaluso conducted the voir dire examination of venireperson Harrison, and Beach conducted the examination of venireperson Johnson, the record is unclear as to who examined venireperson Rooks. Macaluso exercised the State's peremptory strike against prospective juror Harrison, and Beach exercised the State's strikes against prospective jurors Rooks and Johnson. Macaluso testified at the *Batson* hearing that, although he did not personally exercise all of the strikes at issue, he did have "some input" into all decisions to excuse a prospective juror.

Appellant contends in his "Memorandum of Law on *Batson* Hearing" that, since the strikes against jurors Rooks and Johnson were exercised by Beach, the testimony of Macaluso concerning the motives behind those

strikes is, as a matter of law, irrelevant with regard to Rooks and Johnson:

> Why Mr. Macaluso generally strikes jurors in no way logically applies to the exercise of a strike by Mr. Beach. Mr. Beach was available to testify at this hearing and was simply not called by the State. (Tr.-7-8). There is, quite simply, no evidence as to why Mr. Beach exercised strikes in two of the three cases at issue.

(Appellant's "Memorandum of Law on *Batson* Hearing" at p.22)

The trial judge, in his "Conclusions of Law", agrees with appellant:

> 7. The testimony of Mr. Macalusco [sic] will not establish why a different prosecutor, Mr. Beach, struck jurors Rooks and Johnson. *Id.*
>
> 8. The State offered no reason why it struck two black jurors, Rooks and Johnson, peremptorilly.

("Findings of Fact & Conclusions of Law", p.7. Emphasis supplied.) The trial judge also referred to these conclusions when he announced his ruling following the *Batson* hearing, stating that one of the "facts" that led him not to consider the testimony of Macaluso was "the absence of Mr. Beach". (S.F. II-8; the judge apparently meant to indicate the absence of Beach's testimony, since Beach was actually present in the courtroom.)

Based on Texas Rules of Criminal Evidence, Rules 401 and 402, and based upon the testimony of Macaluso at the Batson hearing, we decline to hold, as a matter of law, that testimony such as that given by Macaluso has no probative value. As a result, we find in the trial judge's

Conclusions of Law numbered 7 and 8, no justification for his decision not to consider Macaluso's testimony.

We specifically note the following testimony by Macaluso concerning the manner in which the voir dire was conducted by the State at appellant's trial:

> Q [By Mr. Anderson, Counsel for Appellant] With regard to the exercise of a peremptory challenge, would it be fair to say that in each exercise of a peremptory challenge that you had some input into the decision-making process?
>
> A [By Macaluso] Yes.
>
> * * *
>
> Q [By Keck, Counsel for the State] Now, Mr. Anderson when he was here asked you about how you and Mr. Beach arrived at this decision [whether to strike a prospective juror]. Let me ask you this: Was there any – has there ever been a situation where y'all just don't agree on the exercise of a challenge?
>
> A [By Macaluso] I can't recall one.
>
> Q If there was, hypothetically speaking in this particular case, who would have resolved that conflict, you or Mr. Beach?
>
> A I would have.
>
> Q Mr. Beach was allowed input into these decisions, but ultimately the decision was being made by you and you're the person who is responsible?
>
> A I recollect this as Mr. Beach's first death penalty voir dire examination. I also recollect got along just fine. I don't recall any problems.
>
> Q I'm not suggesting that there were. What I'm trying to establish is if push had come to shove –

A Right. I understand what you are saying. I'm saying it never came to that.

From this testimony, the reliability of which we have no reason to doubt, it is clear to us that any peremptory strike exercised by the prosecutors in this cause was the result of a cooperative and collective decision-making process. Therefore, Macaluso's testimony would certainly be relevant to the determination of the motives behind such decisions, and as such the trial judge should have considered it in deciding the merits of appellant's *Batson* claim.

We find that the trial judge erred in refusing to consider the testimony of Macaluso in deciding whether the State had a valid race-neutral explanation for its exercise of the peremptory strikes at issue. We decline to hold, as a matter of law, that Macaluso's testimony was irrelevant and of no probative value simply because it pertained to jurors whom Beach questioned, or to strikes that Beach announced in court. We must reemphasize that we do not presume to decide for the trial judge what weight to assign to Macaluso's testimony; neither do we comment on Macaluso's credibility, but the State is clearly entitled to have Macaluso's testimony considered by the trial judge.

Therefore, we again abate this cause to the trial court so that that trial judge may reconsider his "Findings of Fact and Conclusions of Law", compose a new set of findings of fact and conclusions of law, and forward same to this Court in a supplemental transcript, in a manner consistent with this opinion, not later than thirty (30) days from the date of this opinion.

It is so ordered.

PER CURIAM

EN BANC

Delivered: June 28, 1989

DO NOT PUBLISH

MILLER and DUNCAN, J.J., dissent.

"APPENDIX A"

P R O C E E D I N G S

THE COURT: I initially presided over the jury selection in this case beginning November the 6th; and we concluded – that's 1985 – we concluded the selection through and including December the 10th, 1985. And as I recall, you all correct me if I'm wrong, but the Defense Attorneys on behalf of their client filed what was known as in those days as a so-called Batson Hearing; and the Court denied their motion proceeding on the assumption that peremptory challenges is something sacred to not only the Defense Attorney but the Prosecution as well; and, apparently, I was wrong as hell; and I apologize for that. It could have saved a lot of time; and the Prosecutors certainly would have the facts fresh in their mind at that time.

I still haven't changed my opinion. The law has changed; so, consequently, I follow the law; but my opinion remains the same. I don't know what purpose a peremptory challenge – what good it is – if it can't be

used in the manner it was intended to be used. In my experience since 1971, I have had a number of Defense Lawyers strike – use peremptory challenge: on Black Jurors and their client was black; so it just – the rationale gives me a lot of problems; but I took an oath to follow the law; and I guess I can't do anything about that.

I think it's patently unfair to come back three (3) years later and ask this Court to conduct an Evidentiary Hearing when this Court has no independent recollection of what in the hell occurred; and according to the record, the Prosecutors didn't either. Mr. Beach didn't testify. That could have made a difference. I feel Mr. Macaluso is perfectly honest. He's always been honest in his dealings with this Court; but his testimony seemed to be, "Judge, if I were faced with this type of situation hypothetically I think this is what I would have done;" and I don't think that's going to cut it; so I am adopting the Defense Attorneys' Fact Findings and Conclusions with one (1) exception. I am not making a recommendation for a new trial. The way I understand, it was remanded for the purposes of me conducting a hearing; and the Defense Attorneys making a *prima facie* case under *Batson*, which the Court found that they did, then the State has to come forward with no burden but they at least have come persuasion to overcome what is known as a preponderance of the evidence. That test to me is ridiculous as well; BUT the Holy Fathers in Austin, I guess, know a lot more law than this Court does.

Nonetheless, I intend to delete that recommendation and let them do what they want to do; and if they want to adopt my findings, there will be a new trial. I am also going to send as part of the record the briefs submitted to

the Court by both parties and also the State's Recommended Fact Findings and Conclusions. I would hope that they would review the State's Fact Findings, as well as the Defendant's and the Court's adoption of the Defendant's; and this is one case I'd be more than happy if they reverse me. They've got a lot of legal minds down there; and the – the Trial Judge is always the whipping boy.

I've read *Keeton* thoroughly. I understand the procedure when I start picking a death penalty week after next. Hopefully, this will never happen again. I apologize to the original lawyers and the State's original lawyers for not granting that motion initially; but as I said before, I didn't think it was appropriate. I still don't; but the law changed; and I changed with the law; and that's the way it is.

Thank you, Gentlemen.

MR. KECK: Judge, could – could I ask you to just state one (1) thing for purposes of the record?

THE COURT: Yes, Sir.

MR. KECK: – So it's clear. The basis of your ruling is that you refuse to consider Mr. Macaluso's testimony on the basis that he couldn't state that he had a present recollection of the reasons –

THE COURT: Yes, Sir.

MR. KECK: – That he had – that he used.

THE COURT: That's one (1) of the reasons; but Mr. Macaluso testified – he's very articulate – and he was the first to admit that he had no independent recollection; all he did was read the prior record; and that didn't really

help him. It – it was more of a hypothetical situation, "Judge, if this had occurred, this is what I would have done." He had no independent memory of – and I don't –

MR. KECK: – Yes. I – I agree that that was –

THE COURT: – And I'm sure no one else does.

MR. KECK: – That was his testimony. No doubt about it.

THE COURT: All right. And hypothetically I – I don't think it – it'll go –

MR. KECK: Yeah.

THE COURT: – I don't think it'll fly.

MR. KECK: – But, Judge, if I could just ask you one other thing to sorta clarify your ruling. If he had given the same testimony that he did but had been able to say, "These WERE my reasons; and I clearly recall them," would – would you then be – take – would you then have a different result in this case?

THE COURT: I – I have difficulty with in – independent recollection after three (3) years, Jeff.

MR. KECK: Well, –

THE COURT: We – we all try and hear so many cases there's no way in the world that I can remember what went on in the Batson jury – or in the Chambers jury selection.

MR. KECK: Yes, Sir. I understand; but – but if – if it'd just been a – less time and for – for whatever reason you'd found his testimony credible in that regard – I

guess what I'm trying to clarify is: It's – its the fact that it was all hypothetical that – that has led you to this whole thing?

THE COURT: Two (2) facts – that's one (1). The other is the absence of Mr. Beach because Mr. Macaluso testified indirectly to Mr. Beach's thought processes; and he was here; and it could have made a big difference. He might have had some independent recollection. I want the Court of Criminal appeals to look at it closely. I hope they recognize my problem. I'm – as I told you – I'm adopting the Fact Findings that have been presented to the Court by the Defense Attorneys. I would urge the Court of Criminal Appeals to review the record – review what you've offered on behalf of the State, Mr. Keck.

MR. KECK: Yes, Your Honor.

THE COURT: And if they think I'm wrong, why I'll certainly welcome their determination.

That's all I have; and, Gentlemen, thank you.

MR. ANDERSON: Thank you, Your Honor.

MR. KECK: Thank you, Your Honor.

END OF PROCEEDINGS

NO. 69,609

RONALD CURTIS CHAMBERS

V.

THE STATE OF TEXAS

ON REMAND FROM THE COURT OF CRIMINAL APPEALS IN THE CRIMINAL DISTRICT COURT NO. 4 OF DALLAS COUNTY, TEXAS, IN CAUSE NO. F85-99385-PK

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed April 14, 1988)

On January 6, 1988, the Court of Criminal Appeals remanded the above-styled and numbered cause to the Criminal District Court No. 4 of Dallas County, Texas, with instructions to hold a hearing to determine the reasons for the State's exercise of peremptory challenges against members of the Appellant's race, and thereafter, to file with the Court of Criminal Appeals relevant Findings of Fact and Conclusions of Law. On March 3, 1988, a hearing was held in the Criminal District Court of Dallas County, Texas, the Honorable Tom Ryan, Judge, sitting for the Honorable Francis Maloney, Judge Presiding. All parties appeared in person and/or by counsel. After evidence offered by the parties and arguments thereon, the Court now makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. The Appellant, Ronald Curtis Chambers, is a black man. (Tr.- 9).[1]

2. The Appellant had prior to trial in this cause, filed a pre-trial motion asking that the State be prohibited from exercising peremptory strikes on members of his race for the reason that they too were black. (R.I- 37).

3. Prior to the beginning of the *voir dire*, and pursuant to the Appellant's pre-trial motion, it was agreed that the race of each potential juror would be reflected in the appellate record by having the court reporter note in the record the race of each potential juror. (R.I- 37; R.IV- 46).

4. During the Court of *voir dire*, sixteen (16) black potential jurors were called for consideration. Of these, eleven (11) were excused upon challenge for cause by the State pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.16 (1965). (R.IV- 42, 44; R.VI- 62, 98; R.VII- 92, 99-100; R. XIV- 8; R.XVIII- 181; R.XXI- 93; R.XXII- 16; R.XV- 46; R.XV- 79; R.XVI- 109; R.XVII- 231; Tr.- 12).

5. Of the remaining five potential black jurors, one, Mrs. Thelma Sanders Clardy, was excused by the parties

---

[1] Throughout these Findings of Fact and Conclusions of Law, the transcription of the proceedings had at the hearing on remand held on March 3, 1988, shall be referred to as "Tr.- ". References to portions of the appellate record which were judicially noted for the purposes of this hearing shall be referred to as required by TEX. R. APP. PROC. APPENDIX FOR CRIMINAL CASES. RULE 1.

by agreement (R.VI- 99-101). The record is silent as to the reason for this agreement.

6. A second black potential juror, Ms. Ethel R. Tennell, was excused upon her claiming of a statutory exemption. (R.XV- 80; Tr.- 12). TEX. CODE CRIM. PROC. ANN. art. 35.04 (1965).

7. The remaining three (3) black potential jurors, Norrette Cereese Johnson, Loretta B. Rooks and Sandra A. Harrison, were all excused when the State exercised a peremptory challenge on each pursuant to TEX. CODE CRIM. PROC. ANN. arts. 35.15 *et. seq.* (1965). (R.VI- 28; R.IX- 68; R.XIV- 36; Tr.- 12).

8. In the case of both Ms. Rooks and Ms. Harrison, the exercise of a peremptory followed the State's unsuccessful efforts to have the potential juror struck for cause. (R.IX- 53; R.XIV -24).

9. In each instance where the State exercised a peremptory challenge to excuse a black potential juror, the Appellant objected to the use of a peremptory strike to excuse the juror, asked that the prosecutor be examined on the issue of use of peremptory strikes to excuse black jurors, and, as a proffer to justify the request to be allowed to examine the prosecutor on the exercise of the strike, advised the trial court that if permitted to question the prosecutor, the Appellant believed that he could establish that the veniremen were stricken due to their race. (R.VI- 38-39; R.IX- 68-68; R.XIV- 36-37). This Court refused to permit the prosecutor to be examined on this issue. The Appellant's proffers that he expected the examinations to establish that the strikes were racially motivated were not challenged by the State.

10. Mr. Paul Macalusco, who at the time of the trial was an Assistant District Attorney for Dallas County, Texas, exercised the State's peremptory challenge against juror Harrison. (R.XIV- 24).

11. Mr. Andy Beach, and Assistant District Attorney for Dallas County, Texas, exercised the State's peremptory challenge against jurors Rooks and Johnson. (R.VI- 28; R. IX- 68).

12. In addition to the black potential jurors stricken by the State peremptorily, the State successfully challenged two black potential jurors (Thomas Johnson & Sharon E. Curtis) and unsuccessfully attempted to challenge a third potential black juror (Loretta Rooks) on the basis that they would not consider the *minimum* punishment in the event that the Appellant was convicted of the lesser included offense of murder. (R.XVIII- 146-181; R.XIV- 47-49; R.VI- 9-69). The State made no corresponding effort to challenge potential white jurors on the basis of their willingness to consider the minimum punishment for a lesser included offense.

13. The State called one of the two prosecutors who conducted part of the *voir dire* in this cause, Paul Macalusco. Mr. Macalusco expressly stated that due to the passage of time since the trial of this cause, he could not remember these jurors, and more specifically, he could not recall why he exercised peremptory strikes to eliminate these black jurors from the Appellant's jury. (Tr.-45, 51, 59, 71, 80-81, 87-88, 94-95, 96, 125-128).

14. Mr. Macalusco testified that although he could not remember why he struck the jurors at issue, he had, prior to the hearing on March 3, 1988, reviewed the

transcription of the *voir dire* proceedings regarding the three jurors stricken and their respective juror questionnaires. (Tr.- 33-34). He then testified, over objection, that *in general* he found certain answers in the *voir dire* and the juror questionnaires which were of such a nature as would, in most, if not all cases, result in his striking similarly situated jurors in other trials.

15. Mr. Macalusco did not testify from a refreshed recollection after reviewing the materials from the original trial. Though he reviewed the materials, they did not refresh his independent recollection, (Tr.-45, 51, 59, 71, 80-81, 87-88, 94-95, 96, 125-128); he was not speaking from memory thus revived. He had no personal knowledge concerning anything which happened at the trial at issue.

16. Mr. Macalusco testified that he had never stricken a potential juror solely on the basis of race. (Tr.- 51, 67, 78).

17. Mr. Macalusco did not exercise all of the strikes at issue, although he did profess to have some input into the decision to strike the juror. (Tr.- 90-93).

18. Mr. Beach was available to testify, however, he was never called by the State. (Tr.- 7-8).

19. The State's *voir dire* questions of members of the accused's race were in no way distinctive, nor did they elicit any information which would, on its face, justify the use of a peremptory challenge on the jurors.

20. The State exercised its peremptory strikes to exclude all members of the accused's race from the jury who were not successfully challenged for cause by the

State. As a result, the Appellant, a black man, was tried by an all white jury. (Tr.- 18).

II.

CONCLUSIONS OF LAW

1. The Appellant established a *prima facie* case of racially discriminatory exercise of peremptory strikes by the State. (Tr.- 31). See: *Batson v. Kentucky*, ___ U.S. ___, 106 S.Ct. 1712 (1986); *Tompkins v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 68,870 delivered 10/7/87).

2. The testimony of Mr. Macalusco that he had not stricken juror Harrison for racial reasons will not rebut the Appellant's *prima facie* case. *Batson v. Kentucky*, 106 S.Ct. at 1723; *Keeton v. State*, ___ S.W.2d ___ (Tex. Crim. App. No. 69, 639 [Opinion on Rehearing] delivered 4/15/87).

3. The testimony of Mr. Macalusco was not based upon a refreshed recollection. TEX. R. CRIM. EVID. 611 (1986); *McCormick on Evidence*, Ed. Cleary, *et. al.* (2nd Ed. 1972) sec. 9, pgs. 14-17.

4. The testimony of Mr. Macalusco was not based upon personal knowledge. TEX. R. CRIM. EVID. 602 (1986); *McCormick on Evidence, Ed. Cleary, et. al.* (2nd Ed. 1972) sec. 10, pgs. 20-22.

5. The testimony of Mr. Macalusco that he cannot remember why he struck juror Harrison is not a "clear and reasonably specific" racially neutral explanation. *Batson v. Kentucky*, 106 S.Ct. at 1723-1724, n.24.

6. The testimony of Mr. Macalusco concerning his general practice in striking jurors in other cases is too

speculative to constitute a "clear and reasonably specific" racially neutral explanation as to why he struck juror Harrison, *Id.*

7. The testimony of Mr. Macalusco will not establish why a different prosecutor, Mr. Beach, struck jurors Rooks and Johnson. *Id.*

8. The State offered no reason why it struck two black jurors, Rooks and Johnson, peremptorilly.

9. The State has failed to adequately rebut Appellant's *prima facie* case of purposeful racial discrimination as to each of the three black jurors on who[m] it exercised peremptory challenges. *Id.*

10. ~~The Appellant should be granted a new trial.~~

SIGNED this 6th day of May 1988.

/s/ Tom Ryan
JUDGE PRESIDING

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 22, 1989

RE: Case No. 69,609,
CRIMINAL DISTRICT COURT #4 -
F85-99385-PK
STYLE: Chambers, Ronald Curtis

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711
MAIL TO: John C. Vance
Crim Dist Attorney
Frank Crowley Crim. Cts. Bldg.
Dallas, TX 75207

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

December 1, 1989

The Honorable John Vance
Criminal District Attorney
7th Floor, County Courthouse
Dallas, Texas 75202

Re: **Chambers v. State,**
No. 69,609

Dear Mr. Vance:

General Mattox has referred to me your request of November 22, 1989, to file a petition for writ of certiorari in the above referenced case. After reviewing the matter thoroughly, our office has decided not to file a petition. Consequently, this letter represents the Attorney General's authorization for your office to file a petition for certiorari.

I wish you the best of luck in this endeavor. If our office can be of any assistance, do hesitate to call on me.

Yours truly,

/s/ Charles A. Palmer
CHARLES A. PALMER
Assistant Attorney General
Assistant Chief, Enforcement
Division

CAP/br

Art. 35.13. Passing Juror for Challenge

A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant.

Challenges to jurors are either peremptory or for cause.

Art. 35.17. Voir Dire Examination

1. When the court in its discretion so directs, except as provided in Section 2, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

2. In a capital felony case, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court.

Art. 35.15. Number of Challenges

(a) In capital cases both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF TEXAS,
Petitioner,

vs.

RONALD CURTIS CHAMBERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

RESPECTFULLY SUBMITTED,

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COUNSEL FOR RESPONDENT

May 10, 1990

QUESTIONS PRESENTED

The Respondent does **not** accept the Petitioner's formulation of the question presented in the instant case. Respondent believes that this case actualy presents the following questions:

1. Can the requirement of *Batson v. Kentucky* that a *prima facie* case of purposeful racial discrimination in the exercise of peremptory strikes by the State be rebutted by the testimony of a prosecutor to the effect that he cannot recall why he exercised the strike, however, he has in other cases has a racially neutral excuse for striking members of the accused's race and that it is his habit not to exercise strikes for racial motivations?

2. Assuming that the first question is answered "yes", will that testimony suffice to rebut a *prima facie* case of purposeful racial discrimination in the exercise of peremptory strikes by the State when the prosecutor **neither conducted the** *vior dire* **of the jurors at issue nor in fact exercised the strikes at issue**? Will the habits on one prosecutor suffice to answer why **another** prosecutor struck a member of the accused's race or must the prosecutor who actually engaged in the racially discriminatory conduct explain his own actions?

3. Should the Court abandon the standards accounced in *Batson v. Kentucky* that the question of whether the State had rebutted a *prima facie* case of purposeful racial discrimination in the exercise of peremptory strikes by the State is a **question of fact** for the trial judge to resolve and substitute in its place a class of "excuses" which will, **as a matter of law**, always rebut the defendant's *prima facie* case of racially discriminatory exercise of peremptory challenges?

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Johnson v. State, 527 S.W.2d 525 (Tex. Crim. App. 1975), 6

Lewis v. State, 775 S.W.2d 13, 15 (Tex. App. - Hou[14th], 1989 *PDR ref'd*), 13

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF TEXAS,
Petitioner,

vs.

RONALD CURTIS CHAMBERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Ronald Curtis Chambers, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Texas Court of Criminal Appeals opinion in this case. That opinion is not yet reported, and appears in the Petitioner's Appendix as "Appendix A".

JURISDICTION

The Respondent does not dispute the jurisdictional statement contained in the petition.

The Respondent would, however, note that whether the State has successfully rebutted a *prima facie* case of racially discriminatory application of peremptory challenges

has been determined to be a **question of fact** for the trial court to resolve. *Batson v. Kentucky*, infra at 476 U.S. 98 and fn. 21. In this case, the trial judge found **as a matter of fact** that "[A]fter considering all of the evidence admitted at the hearing, and after evaluating the credibility of the witness and giving due weight to the evidence proffered by the State, the Court was, and still is, of the opinion that the State has failed to meet the 'clear and reasonably specific" criteria constitutionally necessary to rebut the Appellant's *prima facie* case of racially discriminatory exercise of peremptory strikes." Trial Court's Findings of Fact, Appendix A-8 of Petitioner's Petition. This **fact finding** was reviewed by the Texas Court of Criminal Appeals and was found to be supported in the appellate record. Appendix A-2, Petitioner's Petition.

Traditionally this Honorable Court will not exercise its jurisdiction merely to review a decision of a state court upon a question of fact. See: *Grayson v. Harris*, 267 U.S. 352, 358 (1952); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 600 (1962). In order to grant the relief that the Petitioner requests, this Honorable Court will of necessity have to reexamine the state court's findings and conclusions of fact which are supported in the record. For this reason, the Respondent respectfully prays that the Court decline jurisdiction of this case.

STATEMENT OF THE CASE

The Respondent expressly objects to the Statement of the Case contained in the Petitioner's Petition for Writ of Certiorari. Respondent believes that the Petitioner's Statement contains material misrepresentations of fact, omits critical facts and includes argument which is unsupported in law and/or the appellate record.

The Respondent, Ronald Curtis Chambers, was charged by indictment with the offense of capital murder. In a jury trial beginning November 6, 1985, the Respondent entered a plea of not guilty to the allegations contained in the indictment charging him with the offense of murder during the course of a robbery. At the conclusion of the guilt/innocence phase of the trial, the Respondent was found guilty and the trial proceeded to the punishment phase. At the conclusion of the punishment phase of the trial, the jury found both of the special issues submitted to it "yes", and, pursuant to Texas law, the Respondent was sentenced to death.

The sufficiency of the evidence to support the verdict is not relevant to the issues presented in the instant Petition. The Respondent will accept the recitation of the trial evidence found at pages four and five of the Petitioner's Petition for Writ of Certiorari as being substantially correct.

In order to fully understand the issues raised by Respondent on appeal and challenged by Petitioner in this Application for Writ of Certiorari, a brief recitation of the facts concerning the jury selection process is necessary.

A special venire was issued to summon potential jurors for the trial of this cause pursuant to the provisions of TEX. CODE CRIM. PROC. ANN. art. 34.01 *et. seq.* (1965). After the veniremen were called and the general excuses and exemptions were resolved by the trial judge pursuant to TEX. CODE CRIM. PROC. ANN. arts. 35.03 & 35.04 (1965), individual *voir dire* of the remaining jurors was conducted pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.17 (2) (1965). (R.II 1-125, R.III- 1-92, R.VI- 11). Prior to the beginning of the individual *voir dire*, it was agreed that the race of the individual jurors would be reflected in the appellate record by having the court reporter note on the record the race of the potential juror. (R.IV- 4-6).

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During the course of the *voir dire*, sixteen (16) black potential jurors were called for consideration. Of these, eleven (11) were excused upon a challenge for cause by the State pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.16 (1965). (R.IV- 42, 44; R.VI- 62, 98; R.VII- 92, 99-100; R. XIV- 8; R.XVIII- 181; R.XXI- 93; R.XXII- 16; R.XV- 46; R.XV- 79; R.XVI- 109; R. XVII- 231).

Of the remaining five potential black jurors, one, Mrs. Thelma Sanders Clardy, was excused by the parties by agreement (R.VI- 99-101). A second black potential juror, Ms. Ethel R. Tennell, was excused upon her claiming of a statutory exemption. (R.XV- 80). TEX. CODE CRIM. PROC. ANN. art. 35.04 (1965).

The remaining three (3) black potential jurors, Norrette Cereese Johnson, Loretta B. Rooks and Sandra A. Harrison, were all excused when the State exercised a peremptory challenge on each pursuant to TEX. CODE CRIM. PROC. ANN. arts. 35.15 *et. seq.* (1965). (R.VI- 28; R.IX- 68); R.XIV- 36). In the case of both Ms. Rooks and Ms. Harrison, the exercise of a peremptory followed the State's unsuccessful efforts to have the potential juror struck for cause. (R.IX- 53; R.XIV -24).

In each instance where the State exercised a peremptory challenge to excuse a black potential juror, the Respondent objected to the use of a peremptory strike to excuse the juror, asked that the prosecutor be examined on the issue of use of peremptory strikes to excuse black jurors, and, as a proffer to justify the request to be allowed to examine the prosecutor on the exercise of the strike, advised the trial court that if permitted to question the prosecutor, the Respondent believed that he could establish that the veniremen were stricken due to their race. (R.VI- 38-39; R.IX- 68-68; R.XIV- 36-37). The trail judge refused to permit the prosecutor to be examined on this issue. The Appellant's proffers that he expected the examinations to establish that the strikes

were racially motivated were not challenged by the State.

Between the State's challenges for cause and its exercise of peremptory challenges, the Respondent, a black man, was tried by an all white jury for the killing of a white man.

In the subsequent direct appeal, the Respondent challenged the prosecutors' exercise of peremptory challenges against the three black potential jurors on the basis of this Honorable Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). [1.]

On direct appeal, it was Respondent's stated position that no remand for a *Batson* hearing was necessary as, under Texas law, since the State failed to contradict the Respondent's proffer that the State's use of its peremptory strikes was racially motivated, the Respondent was entitled to relief as a matter of law. This proffer was never denied or modified or contradicted in any manner, and, thus, should be binding on the

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1. Respondent recognizes that the Supreme Court's decision in *Batson* was handed down April 30, 1986, some four months after the trial of this cause. This Court has, however, subsequently held that the decision in *Batson* shall be applied retroactively to those cases which were pending on direct appeal on the date that the decision was rendered. See: *Griffith v. Kentucky*, 479 U.S. 314 (1987). The instant case falls within these guidelines making the decision of the Court in *Batson* fully applicable in this case. Assuming, arguendo, that *Batson* were not applicable to this case, the Respondent would nevertheless be entitled to a reversal of his conviction as his uncontradicted proffer established that the exclusions at issue were racially motivated bringing him within the dictates of *Swain v. Alabama*, 380 U.S. 202 (1965).

State and under Texas law, should have been binding on the reviewing court.[2.]

The Respondent argued that in this case, the State had a full opportunity to explain why they struck all possible black jurors. When the Respondent sought to elicit testimony to establish that the strikes were racially motivated, the State refused to provide that testimony. When the Respondent advised the Court that he expected the evidence would show that the strikes were racially motivated, the State failed to deny or contradict this allegation. Even under the long standing holding of *Swain* the Respondent had established an uncontradicted *prima facie* case that the State had excluded the aforesaid black veniremen for racial reasons, thus the State may not plead that it should be permitted a second opportunity to explain its actions based upon the Supreme Court's holding in *Batson*. The State chose to stay silent at trial and should not be permitted to avoid the results of that choice by being permitted to attempt to justify

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2. See: *Stewart v. State*, 686 S.W.2d 118, 122 (Tex. Crim. App. 1984) (an offer by counsel of a statement concerning what the excluded evidence would have been had the testimony been admitted preserves exclusion for appellate review); *Johnson v. State*, 527 S.W.2d 525 (Tex. Crim. App. 1975) (defendant must proffer evidence when it becomes relevant to preserve for appellate review). *See:* TEX. CODE CRIM. PROC. ANN. art. 36.20 (1965) (since repealed); TEX. R. APP. PRO. 52 (1986); *Evans v. State*, 622 S.W.2d 866, 868 (Tex. Crim. App. 1981) (appellate court bound by the record on appeal as presented to it); *Williams v. State*, 485 S.W.2d 274 (Tex. Crim. App. 1972) (matters not supported by appellate record may not provide a basis for making any appellate decision); *Farris v. State*, 712 S.W.2d 512 (Tex. Crim. App. 1986) (party may not supplement an appellate record by adding new testimony not educed at original trial).

s actions at this late date. The Texas Court of Criminal Appeals did not address this rgument, rather it remanded the case to the trial court for a retrospective *Batson* earing.

On March 3, 1988, the retired state district judge who presided over the jury selection process in Respondent's trial conducted the retrospective *Batson* hearing ordered by the Texas Court of Criminal Appeals. The judge took judicial notice of the events which transpired during the original *voir dire*, including the fact that the State exercised its peremptory strikes to exclude all members of the accused's race from the jury who were not successfully challenged for cause by the State; it exercised a disproportionate percentage of its strikes to exclude members of the accused's race from the jury; its *voir dire* questions of members of the accused's race were in no way distinctive, nor did they elicit any information which would, on its face, justify the use of a peremptory challenge on the jurors; much of the questioning of black jurors was perfunctory and not designed to elicit any information which would justify using a peremptory strike; the State sought to challenge blacks for cause on frivolous grounds, and when those were rejected by the court, the State exercised a peremptory challenge to exclude the black jurors; as a result of the prosecutor's exercise of the State's peremptory challenges, members of the Respondent's race were substantially underrepresented on his jury; the State exercised peremptory challenges on blacks who, by their answers during *voir dire* appeared to be strong law enforcement advocates and pro-State. Based upon these facts, the trial judge determined that the Respondent had established a *prima facie* case of purposeful racial discrimination by the State in its exercise of peremptory challenges. The State does not now challenge this finding.

In an effort to rebut the Respondent's *prima facie* case of discriminatory exercise of peremptory challenges, the State called one of the two prosecutors who conducted part

of the *voir dire* in this cause, Paul Macaluso. Mr. Macaluso expressly stated that due to the passage of time since the trial of this cause, he could not remember these jurors, and more specifically, he could not recall why he exercised peremptory strikes to eliminate these black jurors from the Respondent's jury. (Tr.-45, 51, 59, 71, 80-81, 87-88, 94-95, 96, 125-128).

Mr. Macaluso did indicate that he had never stricken a potential juror solely on the basis of race, (Tr.- 51, 67, 78); however, this Honorable Court specifically rejected such an "excuse" as an adequate basis for finding that the accused's *prima facie* case of discrimination had been rebutted, holding that the prosecutor could not rebut a *prima facie* case "merely by denying that he had a discriminatory motive or affirming his good faith in individual selections." *Batson*, supra at 1723. Further, this prosecutor, Mr. Macaluso, did not exercise all of the strikes at issue, although he did profess to have "some input" into the decision to strike the juror. See, e.g.: (Tr.- 90-93) and where Mr. Beach, and not Mr. Macaluso, exercised the State's peremptory strike on jurors Rooks a Johnson. (R.VI- 28; R.IX- 68).

In attempting to justify their striking of the black jurors, the prosecutor testified that though he couldn't remember why he struck the jurors at issue, he had, prior to the hearing on March 3, 1988, reviewed the transcription of the *voir dire* proceedings regarding the three jurors stricken and their respective juror questionnaires. (Tr.- 33-34). He then testified, over objection, that in general he found certain answers in the *voir dire* and the juror questionnaires which were of such a nature as would, in most if not all cases, result in his striking similarly situated jurors in other cases.

It must be remembered that Mr. Macaluso did not testify from a refreshed recollection after reviewing the materials from the original trial. Though he reviewed the

naterials, they did not refresh his independent recollection, (Tr.-45, 51, 59, 71, 80-1, 87-88, 94-95, 96, 125-128); he was not speaking from memory thus revived. He had no ersonal knowledge concerning anything which happened at the trial at issue and based is testimony entirely on habit in other cases.

Even though inadmissible as a matter of Texas Evidentiary law, the prosecutor was permitted to testify concerning general matters of practice and procedure employed by him in exercising peremptory challenges in other cases. The proposed inference presumably is that if he struck jurors generally in other cases on the grounds related, he struck the instant jurors for similar non-racial reasons.

In addition, it was clearly established that Mr. Macaluso did not make two of the strikes at issue. Mr. Beach did. Mr. Macaluso had no knowledge as to why Mr. Beach exercised strikes, testifying only that he recalled that they discussed the strikes and that Mr. Macaluso had "some input" into the decision. He did not make the strikes at issue; he did not know why Mr. Beach made the strikes; he did discuss the decision and generally had some input into the decision, but could not testify as to Mr. Beach's thought processes or reasons for making two of the three strikes at issue. (Tr.- 7-8). There is, quite simply, no evidence as to why Mr. Beach exercised strikes in two of the three cases at issue.

After briefing by the parties and submission of proposed findings of fact and conclusions of law by both sides, the trial judge reconvened the proceedings on May 6, 1988, and announced rulings in favor of Respondent. The complete record, including findings of fact and conclusions of law was forwarded to the Texas Court of Criminal Appeals.

In a post submission brief, the State complained that based upon portions of the findings of fact and record which it found ambiguous, the Court could not be sure that the trial judge had given full consideration to the testimony of Mr. Macaluso. Essentially, the State argued that the trial judge had rejected the testimony out of hand and had not properly considered it.

On June 28, 1989, the Texas Court of Criminal Appeals delivered a *per curiam* opinion declaring that it could not be sure from the record that the trial judge had properly "considered" the proffered testimony, but expressly refusing to judge the weight or credibility of the witness' testimony, and remanded it to the trial judge to supplement his findings of fact to clarify whether he had considered the testimony in reaching the conclusions contained in the findings of fact filed with the Court.

On July 18, 1988, the trial judge filed new findings of fact and conclusions of law wherein he clarified his earlier findings by expressly stating that he had considered the testimony of the only State's witness. The findings of fact otherwise remained the same.

These findings were forwarded to the Texas Court of Criminal Appeals, and on October 25, 1989, that court adopted those findings in its opinion, finding that they were adequately supported in the appellate record. In that opinion, the Texas Court of Criminal Appeals reversed the Respondent's conviction and remanded the case to the trial court for a new trial. It is from this opinion of the Texas Court of Criminal Appeals that the State now seeks relief.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Criminal Appeals holding in this case has no particular importance to the interpretation of *Batson* and if left undisturbed, the holding will have no impact on the public's confidence in the criminal justice system.

In its first reason for granting this writ, the State suggests that the instant decision is a critical holding that will seriously erode the public's confidence in the criminal justice system. Any serious, impartial review of this case, or the cases handed down by the Texas appellate courts since this Honorable Court's decision is *Batson* will quickly dispel any such conclusion.

First, this case does not purport to provide any guidance or explanation of the *Batson* case. All this decision holds is that the unique findings of fact are adequately supported in the appellate record. The conclusions of law are each quotations from existing cases and break no new ground whatsoever. This case will have next to no precedential value and is clearly limited to the unique facts of this case.

Second, the State suggests that the Texas Courts have somehow fallen into *a* "morass" and are incapable of dealing with the *Batson* decision absent some additional guidance from this Honorable Court. Nothing could be further than the truth.

Since 1986, when the *Batson* case was handed down, the Texas courts have had numerous opportunities to address the application of that holding.

First, the various courts exercised their jurisdiction to abate numerous appeals and remand the cases to the trial court for retrospective *Batson* hearings such as were had in this case. See Appendix A.

After such hearings were had, a review of WESTLAW shows seventy-four (74) unpublished decisions and eight-nine (89) published decisions addressing the application of

Batson. Under Texas law, the appellate courts may only declare a case to be unpublished if the issues are clearly settled. TEX. R. APP. PROC. 90. The standards for publication dictate that an opinion by the court of appeals shall be published only if, in the judgment of the majority of the justices participating in the decision, it is one that "(1) establishes a new rule of law, alters or modifies and existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority."

Clearly, the shear volume of unpublished cases in Texas dealing with *Batson* issues establishes that the Texas courts do not believe that the issues presented are particularly difficult or deal with matters of continuing public interest.

Of the published opinions, seventy-nine (79) resulted in the appellate court determining that either the appellant failed to establish a *prima facie* case, or that prosecutor gave racially neutral explanations sufficiently related to the facts of the case to rebut the *prima facie case*. See Appendix B.

Not counting this case, there have been a total of ten (10) published cases where the prosecutor's explanation was found inadequate. In three cases, the prosecutor admitted that he had exercised a peremptory challenge on the accused because of the race of the juror: *Robinson v. State*, 756 S.W.2d 62 (Tex. App. - Texarkana, 1988) *no PDR*; *McKinney v. State*, 761 S.W.2d 549, 551 (Tex. App. - Corpus Christi, 1988) *no PDR*; *Speake v. State*, 740 S.W.2d 486 (Tex. App. - Hou[1st], 1997) *no PDR*.

In two cases, the appellate court simply noted that the trial court had filed findings of fact noting that the state's exercise of peremptory strikes on minorities was racially motivated, and that their review of the record showed that the findings

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were supported in the record of the *Batson* hearing: *Miller v. State*, 741 S.W.2d 501 (Tex. App. - Corpus Christi, 1987); *Witz v. State*, 749 S.W.2d 519, 520 (Tex. App. - Hou[14th], 1988) *no PDR*.

In another case, the State refused to give any reason for the exercise of their strikes after the appellant established a *prima facie* case: *Seubert v. State*, 749 S.W.2d 585 (Tex. App - Hou[1st] 1988.

The final group of cases were reversed when the prosecutor gave explanations that were not related to the facts of the case, there was a total lack of meaningful questioning by the prosecutor, there was disparate treatment of jurors (persons with the same or similar characteristics were not struck), there was disparate examination of the members of the venire (questions of a challenged juror so as to evoke a certain response without asking the same questions of other members of the venire), and explanations based upon assumed group traits not shown to apply to the challenged juror specifically: *Lewis v. State*, 775 S.W.2d 13, 15 (Tex. App. - Hou[14th], 1989) *PDR ref'd*; *Daniels v. State*, 768 S.W.2d 314 , 315 (Tex. App. - Tyler, 1988) *PDR ref'd*; *Lewis v. State*, 779 S.W.2d 449, 454 (Tex. App. - Tyler, 1989); *Hill v. State*, 775 S.W.2d 754 (Tex. App. - Dallas, 1989) *PDR ref'd*.

Clearly, the only way the State can loose a *Batson* argument is if it confesses error, refuses to answer at all, or makes an answer that is either totally refuted by the record or so vague and unconnected to the case as to constitute no answer at all.

The business of criminal justice in Texas has in no way been eroded by this case, nor by *Batson* itself. The Texas courts are more than up to the challenge of resolving these issues and have, in fact, done so with remarkable dispatch. No one is

"bewildered" by this holding or any other holding on *Batson* handed down by the Texas appellate courts.

2. The holding below is totally consistent with this Court's opinion in *Batson*.

In its second reason for review, the State suggests that the instant opinion is in conflict with this Honorable Court's holding in *Batson*. Again, a review of the proceedings below and the limited opinion in this case clearly establishes that the instant opinion is at total harmony with *Batson*.

In this case, the Respondent established a *prima facie* case of racial discrimination in the application of the State's peremptory challenges. In an effort to rebut that showing, the state called one of two prosecutors who represented the State at the *voir dire* proceedings in this case. He testified that he couldn't remember why he struck the one juror he struck. He further admitted that he didn't strike two of the black jurors at issue, another prosecutor did.

If *Batson* has any meaning at all, it must mean that "I don't remember" will not constitute a reasonably specific racially neutral explanation related to the facts of the case sufficient to justify a finding that a *prima facie* case has been rebutted. Surely some explanation is clearly required. The instant explanation is totally speculative, inferential and in no way related to this particular case.

Further, the one witness the State chose to call did not in fact strike two of the three jurors at issue! The witness that they did call had no independent knowledge as to why those jurors were stricken, and could only state that he had some "input" into the decision. Perhaps he didn't act for racially discriminatory reasons, but the record is silent as to the motivation of the prosecutor who in fact conducted the instant *voir dire* and who in fact exercised the peremptory strikes at issue.

This Honorable Court specifically stated that it intended the prosecutor to come rward "with a neutral explanation of his action" to rebut a *prima facie case.* *mphasis added) Batson*, supra at 100. Clearly, to rebut the Respondent's *prima cie* case with regards to jurors Rooks and Johnson, the prosecutor who onducted the *voir dire*, who made the decision to exercise the State's strike nd who actually made that strike, Mr. Beach, if available, is constitutionally required come forward and explain "his action". The record in this case affirmatively stablishes that Mr. Beach was available to testify.

It seem curious to suggest that in light of a requirement to explain why strikes ere used on members of the Respondent's race, the State would tenaciously hold to the osition that "I don't remember" and "I didn't do it" would suffice. Rather than ender the prosecutor's explanations futile, all this case does is state that where no easonable explanation is proffered, or where that explanation consists of "I don't emember", the State has failed to meet its burden. Such a holding is in total accord ith this Honorable Court's decision in *Batson*.

Further, even if one prosecutor could speak for the actions of another, then that rosecutor should have to explain why the first prosecutor struck the juror at issue. here was no such explanation here. All Mr. Macaluso stated was why he acted the way e did, not why Mr. Beach acted as Mr. Beach was shown to have acted. Mr. Macaluso stified concerning his prior actions in other cases, attempting to raise the ference that if he had acted in a racially neutral manner in striking blacks in her cases, he must have also acted in a racially neutral manner in this case, even ough he admitted that he could not in fact testify that such was the case.

Finally, the excuses proffered by Mr. Macaluso concerning his actions in other cases were not related to the facts of the case, there was a total lack of meaningful questioning by the prosecutor, there was disparate treatment of jurors (persons with the same or similar characteristics were not struck), there was disparate examination of the members of the venire (questions of a challenged juror so as to evoke a certain response without asking the same questions of other members of the venire), and explanations based upon assumed group traits not shown to apply to the challenged juror specifically. Even if the testimony was accepted at face value, it is of the nature that would fail to rebut the Respondent's *prima facie* case of racially discriminatory application of the State's peremptory challenges.

3. The meaning of the phrase "clear and reasonably specific" explanation, as that term applies to *Batson* has been extensively explained by the lower courts and no further explanation is required.

The State's suggestion that the term "clear and reasonably specific" explanations for the exercise of peremptory challenges has not been adequately addressed by the lower courts is unsupportable. As noted above, the Texas courts have had nearly 90 opportunities in published opinions to address this issue. Essentially, any explanation will suffice, unless that explanation constitutes an admission of racial motivation in making a strike or the explanation is totally refuted by the record, such as when the reason given is that the juror is too young, but similarly situated white jurors were not stricken.

The Texas courts have been extremely tolerant of the State's use of peremptory challenges to exclude members of the accused's race. Day in and day out, black men continue to be tried by all white juries. As long as the State makes even the slightest effort to justify its use of peremptory challenges on

non-racial grounds, the courts will accept that reason unless the excuse is clearly and demonstrably false.

The problem in this case is that the State simply couldn't, or wouldn't, explain why it struck three black jurors. The State wishes this Court to declare that "I can't remember" is a specific, racially neutral excuse related to the facts of the case. Such a conclusion is totally out of harmony with the clear holding in *Batson*, and would, if adopted, totally evicerate *Batson*.

4. The holding of the Texas Court of Criminal Appeals is in no way inconsistent with this Honorable Court's previous interpretations of any term in any case, including Title VII cases.

The argument advanced by the State in this reason for review assumes that the State in fact gave an explanation for the exercise of peremptory challenges on the remaining members of the Respondent's race. As previously noted, the State totally failed to make any explanatiCn as to why two jurors were stricken, and the only explanation as to the third juror was that in other cases the prosecutor had not stricken jurors for racial reasons.

In no instance has Respondent been able to find a Title VII case where "I don't remember" constituted a "clear and reasonably specific' explanation to justify racially discriminatory actions. The State cites to no such case. The State did not offer any legitimate reason for the strikes at issue, and the holding of the Texas Court of Criminal Appeals is in no way inconsistent with any holding of this Honorable Court.

5. The State failed to give any explanation as to why Prosecutor Beach struck two of the three black jurors in this case, and failed to give any reason why Prosecutor Macaluso struck the third black juror.

In its fifth reason for review, the State seeks to suggest that it gave an adequate

justification for striking the three black jurors and, therefore, the instant case should be reversed. This conclusion ignores the clear import of the trial testimony and the clear intention of this Honorable court to rely on the trial judge's determination of whether the excuses proffered meet the standards set out in *Batson*.

While the State gives lip service to the proposition that the trial judge is the sole arbiter of the testimony given, it then ignores the clear and unmistakable finding of fact by the trial judge that the State did not explain why Prosecutor Beach struck two jurors. Further, the State ignores the clear finding of fact that the excuses given by Prosecutor Macaluso were not sufficiently specific, or related to this case to rebut the Respondent's *prima facie* case of racially discriminatory use of peremptory challenges.

Further, the State totally ignores the fact that Prosecutor Macaluso could not remember this case in any particulars, and could not state why he struck the one juror he struck. All he could do was say that in other cases he had exercised strikes for specified reasons, and that he assumed that consistent with his habit, he had exercised the strike on Juror Harrison for similar reasons. He could not, or would not, affirmatively state under oath that in fact these reasons were why he struck Juror Harrison.

Further, although he professed to have some "input" into the decision of Prosecutor Beach to strike the other two jurors, he admitted that he didn't make the strike, couldn't say why Prosecutor Beach struck the jurors, and couldn't begin to testify as to the thought processes of Prosecutor Beach.

Prosecutor Beach was available at the hearing to testify, but the State chose not to

call him, raising the reasonable inference that his testimony would not support the State's efforts to rebut the Respondent's *prima facie* case.

At no time did Prosecutor Macaluso testify to any fact, only to habit. He expressly stated he had no independent memory of the events of the trial. His testimony was exclusively about what he did in other cases, not this one. When stripped of the State's hyperbole, the testimony was simply "I don't remember" coupled with, "well, I didn't do it any case that I can remember, so I must not have done it in this case either". To suggest that such vague, speculative, self-serving testimony will, as a matter of law, meet the State's burden of proof is to argue that no answer short of a judicial confession by the prosecutor will result in an accused having an opportunity to be tried by members of his own race.

In *Batson*, this Honorable Court held that whether the State had rebutted a *prima facie* case of racially discriminatory application of its peremptory challenges was a **matter of fact** for the trial judge to resolve. *Batson*, supra at 476 U.S. 98 and fn. 21. In this case, the trial judge found **as a matter of fact** that "[A]fter considering all of the evidence admitted at the hearing, and after evaluating the credibility of the witness and giving due weight to the evidence proffered by the State, the Court was, and still is, of the opinion that the State has failed to meet the 'clear and reasonably specific" criteria constitutionally necessary to rebut the Appellant's *prima facie* case of racially discriminatory exercise of peremptory strikes." Trial Court's Findings of Fact, Appendix A-8 of Petitioner's Petition. This **fact finding** was reviewed by the Texas Court of Criminal Appeals and was found to be supported in the appellate record. Appendix A-2, Petitioner's Petition.

What the State is in fact asking this Honorable Court to do is to abandon the

formulation that whether the State has managed to rebut the Respondent's *prima facie* case is a question of fact for the trial judge to resolve, and to substitute in its stead a class of answers that will, **as a matter of law**, always suffice to rebut the *prima facie* case. In essence, the State wants to take the trial judge out of the resolution of these types of cases and to permit it to list one of a category of answers that will in every case rebut the accused's showing of racially discriminatory application of peremptory strikes. As long as this is a matter of fact for the trial judge to resolve, there is at least an outside chance that the State will lose a *Batson* hearing. The State proposes a new standard that will ensure that it cannot lose.

6. There is no need for this Honorable Court to further address the issue of what constitutes "clear and reasonably specific" testimony as the lower courts have clearly and unambiguously resolved that issue.

The State argues that the trial judge refused to consider the testimony of Prosecutor Macaluso. This simply isn't true. The trial judge clearly stated in his second findings of fact and conclusions of law that he had considered this testimony. What he also considered was the fact that Prosecutor Macaluso did not in fact strike two of the three jurors at issue; that Prosecutor Macaluso had "some input" into the decision to strike these jurors but, in the final analysis, simply didn't conduct the *voir dire* at issue, didn't make the decision at issue nor did he in fact exercise the peremptory strike at issue. What the trial judge also considered was that the prosecutor who made the decision was present and available to testify as to his motivations and reasoning, but the State chose not to call him. The obvious inference from this failure is that the testimony would not have aided the State's case. Finally, the trial judge clearly considered the simple fact that one prosecutor cannot possible testify as to the thought processes or motivations of another prosecutor.

When stripped of the smoke and mirrors, the State is actually asking this Honorable Court to sanction the State's use of one prosecutor, who has no memory of the trial, to testify about his general practices, and from those practices, to infer that since he had not struck jurors for racial purposes in other cases, he also did not strike jurors in this case for racial purposes. Further, they are asking this Court to sanction calling one prosecutor to explain the acts and motives of another prosecutor, even though he readily admitted that he didn't know what the motivations were and couldn't even testify as to his own mental processes, let alone the mental processes of another prosecutor. The State simply couldn't rebut the Respondent's *prima facie* case of racially discriminatory exercise of peremptory challenges. There was no evidence available to them, probably due to the simple passage of time. The trial judge, viewing this testimony, rightly found that the evidence was so speculative and inferential that it simply couldn't be sufficient to rebut a *prima facie* case. Under the facts of this case, any other conclusion would have been absurd.

CONCLUSION

In Texas, black men are still tried by all white juries for crimes allegedly committed against white men. *Batson* didn't change that. In this one case, the trial judge, when viewing the testimony, concluded that the Respondent had made a *prima facie* case of racially discriminatory application of peremptory strikes to ensure that Ronald Curtis Chambers would be tried by an all white jury. The State does not now contest that conclusion. With that decision, the burden shifted to the State of Texas to establish by clear and reasonably specific testimony exactly why the State struck members of the Respondent's race. The trial judge, hearing the testimony, had the temerity to conclude that "I don't remember" simply would not suffice. The judge also noted that the prosecutor who did testify, didn't conduct the *voir dire*, nor did he actually exercise the peremptory strikes used to exclude two black jurors from the jury. There was, thus, NO evidence to explain the prosecutor's actions. The prosecutor was available to testify, but the State chose not to put him on the stand. Under the facts of this case, the trial judge simply refused to sanction such vague, speculative and inferential suppositions as the kind of clear and reasonably specific answers necessary to rebut a *prima facie* case of racial discrimination. The Texas Court of Criminal Appeals carefully reviewed the trial judge's findings, and recognizing this Honorable Court's decision that the trial judge's opinions should carry great weight, determined that his conclusions were totally supported in the record and that his conclusions of law were accurate statements of the controlling authority. Ronald Curtis Chambers thus became one of a very few inmates who would receive relief on the basis of this Honorable Court's decision in *Batson*.

If the "excuses" proffered herein are legally adequate, in light of this record, then the Equal Protection Clause of the United States Constitution has in truth become a "vain and illusory requirement", the precise result which this Honorable Court sought

to avoid with its holding in *Batson*. Any other interpretation would clearly eviscerate *Batson* and make it like the tale told by an idiot in Shakespeare's Macbeth: "full of sound and fury, signifying nothing." Macbeth, Wm. Shakespeare, Act V, Scene V, line 17. This Honorable Court should deny the State's petition for a writ of certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

APPENDIX A

CASES REMANDED FOR BATSON HERAINGS

Garza v. State,
725 S.W.2d 482 (Tex. App. - Corpus Christi, 1982)

Hardy v. State,
726 S.W.2d 158 (Tex. Crim. App. 1987)

Henry v. State,
729 S.W.2d 732 (Tex. Crim. App. 1987)

Cleveland v. State,
728 S.W.2d 490 (Tex. App. - Ft. Worth, 1987)
(Opinion on Motion for Rehearing),
remanded 730 S.W.2d 886 (Tex. App. - Ft. Worth, 1987)

Miller v. State,
682 S.W.2d 538 (Tex. Crim. App. 1984)
remanded 731 S.W.2d 563 (Tex. Crim. App. 1987)

Miller v. State,
733 S.W.2d 287 (Tex. App. - Corpus Christi, 1987)

DeBlanc v. State,
732 S.W.2d 640 (Tex. Crim. App. 1987)

Williams v. State,
736 S.W.2d 906 (Tex. App. - Corpus Christi, 1987)

Robinson v. State,
738 S.W.2d 673 (Tex. Crim. App. 1987)

Chambers v. State,
742 S.W.2d 695 (Tex. Crim. App. 1988)

Wiltz v. State,
746 S.W.2d 303 (Tex. App. - Hou[14th], 1988)

Lee v. State,
747 S.W.2d 57 (Tex. App. - Hou[1st], 1988)

MillerEl v. State,
748 S.W.2d 459 (Tex. Crim. App. 1988)

Keeton v. State,
724 S.W.2d 58 (Tex. Crim. App. 1987)

Williams v. State,
767 S.W.2d 872 (Tex. App. - Dallas, 1989)

Newsome v. State,
771 S.W.2d 620 (Tex. App. - Dallas, 1989)

Hawkins v. State,
783 S.W.2d 288 (Tex. App. - Dallas, 1989)

Dewberry v. State,
776 S.W.2d 589 (Tex. Crim. App. 1989)

APPENDIX B
CASES AFFIRMED ON BATSON ISSUES

Gardner v. State,
738 S.W.2d 541 (Tex. App. - Hou[1st], 1989)

Jones v. State,
781 S.W.2d 415 (Tex. App. - Hou[1st], 1989)

Price v. State,
782 S.W.2d 266 (Tex. App. - Beaumont, 1989)

Vargas v. State,
781 S.W.2d 356 (Tex. App. - Hou[1st], 1989)

Tims v. State,
779 S.W.2d 517 (Tex. App. - Beaumont, 1989)

Hinojosa v. State,
780 S.W.2d 299 (Tex. App. - Beaumont, 1989)
(reversed on other grounds, affirmed re: *Batson* issues)

Grimes v. State,
779 S.W.2d 124 (Tex. App. - Hou[1st], 1989)

Arnold v. State,
778 S.W.2d 172 (Tex. App. - Austin, 1989)

Campbell v. State,
775 S.W.2d 419 (Tex. App. Hou[14th], 1989)

Munson v. State,
774 S.W.2d 778 (Tex. App. - El Paso, 1989)

Branch v. State,
774 S.W.2d 781 (Tex. App. - El Paso, 1989)

Dennis v. State,
772 S.W.2d 525 (Tex. App. Beaumone, 1989)

Holman v. State,
772 S.W.2d 530 (Tex. App. - Beaumont, 1989)

Barnett v. State,
771 S.W.2d 654 (Tex. App. - Corpus Christi, 1989)

Ortiz v. State,
773 S.W.2d 941 (Tex. App. - San Antonio, 1989)

Perry v. State,
770 S.W.2d 950 (Tex. App. - Ft. Worth, 1989)

Allen v. State,
769 S.W.2d 563 (Tex. Crim. App. 1989)

Brown v. State,
769 S.W.2d 565 (Tex. Crim. App.)
(Reversed on other grounds; affrimed as to *Batson* issue)

Jackson v. State
772 S.W.2d 459 (Tex. App. - Beaumont, 1989)

Green v. State,
771 S.W.2d 576 (Tex. App. - Hou[14th], 1989)

Mathews v. State,
768 S.W.2d 731 (Tex. Crim. App. 1989)

Wilson v. State,
769 S.W.2d 682 (Tex. App. - Beaumont, 1989)

Crawford v. State,
770 S.W.2d 51 (Tex. App. - Texarkana, 1989)

Sims v. State,
768 S.W.2d 863 (Tex. App. - Texarkana, 1989)

Sosa v. State,
769 S.W.2d 909 (Tex. Crim. App. 1989)

McGee v. State,
774 S.W.2d 229 (Tex. Crim. App. 1989)

York v. State
764 S.W.2d 328 (Tex. App. - Hou[1st], 1988)

Catley v. State
763 S.W.2d 465 (Tex. App. - Hou[14th], 1988)

Castillo v. State,
761 S.W.2d 495 (Tex. App. - Waco, 1988)

Cruz v. State,
762 S.W.2d 624 (Tex. App. - Hou[14th], 1988)

Anderson v. State,
758 S.W.2d 676 (Tex. App. - Ft. Worth, 1988)
(Reversed on other grounds; affrimed as to *Batson* issue)

Jones v. State,
756 S.W.2d 376 (Tex. App. - Hou[14th, 1988)

Hastings v. State,
755 S.W.2d 183 (Tex. App. - San Antonio, 1988)

Ex parte Halburton,
755 S.W.2d 131 (Tex. Crim. App. 1988)

Allen v. State,
753 S.W.2d 792 (Tex. App. - Beaumont, 1988)

Williams v. State,
752 S.W.2d 729 (Tex. App. - Corpus Christi, 1988)

Williams v. State,
773 S.W.2d 525 (Tex. Crim. App. 1988)

Allen v. State
751 S.W.2d 931 (Tex. App. - Hou[1st], 1988)

Singleton v. State,
751 S.W.2d 316 (Tex. App. - Hou[14th], 1988)

Glenn v. State,
754 S.W.2d 290 (Tex. App. - Hou[1st], 1988)

Brown v. State,
750 S.W.2d 340 (Tex. App. - Beaumont, 1988)

Keeton v. Sate,
749 S.W.2d 861 (Tex. Crim. App. 1988)

Stewart v. State,
748 S.W.2d 543 (Tex. App. - Dallas, 1988)

Levy v. State,
749 S.W.2d 176 (Tex. App. - Hou[14th], 1988)

Rice v. State,
746 S.W.2d 356 (Tex. App. - Ft. Worth, 1988)

Agbogun v. State,
756 S.W.2d 1 (Tex. App. - Hou[1st], 1988)

Kemp v. State,
746 S.W.2d 316 (Tex. App. - Hou[1st], 1988)

Mead v. State,
759 S.W.2d 437 (Tex. App. - Ft. Worth, 1988)

Chandler v. State,
744 S.W.2d 341 (Tex. App. - Austin, 1988)

McKinney v. State,
744 S.W.2d 252 (Tex. App. - Waco, 1988)

Ali v. State,
742 S.W.2d 749 (Tex. App. - Dallas, 1987)

DeGrate v. State,
741 S.W.2d 553 (Tex. App. - Ft. Worth, 1987)

Porter v. State,
740 S.W.2d 600 (Tex. App. - Ft. Worth, 1987)

Easter v. State,
740 S.W.2d 107 (Tex. App. - Amarillo, 1987)

Johnson v. State,
740 S.W.2d 868 (Tex. App. - Hou[14th], 1988)

Salazar v. State,
745 S.W.2d 85 (Tex. App. - Ft. Worth, 1987)

Adams v. State,
740 S.W.2d 60 (Tex. App. - Dallas, 1987)

Tompkins v. State,
774 S.W.2d 195 (Tex. Crim. App. 1987)

Rasco v. State,
739 S.W.2d 437 (Tex. App. - Hou[14th], 1987)

Kline v. State,
737 S.W.2d 895 (Tex. App. - Hou[1st], 1987)

Garza v. State,
739 S.W.2d 374 (Tex. App. - Corpus Christi, 1987)

Dewberry v. State,
734 S.W.2d 260 (Tex. App. - Dallas, 1987)

Yarbough v. State,
738 S.W.2d 86 (Tex. App. - Dallas, 1987)

Smith v. State,
734 S.W.2d 694 (Tex. App. - Hou[1st], 1987)

Grady v. State,
730 S.W.2d 191 (Tex. App. - Dallas, 1987)

Allen v. State,
726 S.W.2d 636 (Tex. App. - Eastland, 1987)

Townsend v. State,
730 S.W.2d 24 (Tex. App. - Texarkana, 1987)

Price v. State,
726 S.W.2d 611 (Tex. App. - Hou[14th], 1987

Sanders v. State,
727 S.W.2d 674 (Tex. App. - Texarkana, 1987)

Catley v. State,
726 S.W.2d 595 (Tex. App. - Hou[14th], 1987)

May v. State,
738 S.W.2d 261 (Tex. Crim. App. 1987)

Rogers v. State,
725 S.W.2d 477 (Tex. App. -Hou[14th], 1987)

Chambers v. State,
724 S.W.2d 440 (Tex. App. - Hou[14th], 1987)

Modden v. State,
721 S.W.2d 859 (Tex. Crim. App. 1986)

Allen v. State,
722 S.W.2d 514 (Tex. App. - Beaumont, 1986)

Rijo v. State,
721 S.W.2d 562 (Tex. App. - Amarillo, 1986)

Hardy v. State,
722 S.W.2d 164 (Tex. App. - Hou[14th] 1986)

Marks v. State,
721 S.W.2d 401 (Tex. App. - Beaumont, 1986)

APPENDIX C

TEX. R. APP. PRO. 90

Rule 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions...

(c) Standards for Publication. an opinion by the court of appeals shall be published only if, in the judgment of the majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies and existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and dissenting Opinions...

(e) Determining to Publish. A majority of the justicies participating in the decision of a case shall determine, prior to the time it is issued, whether an o-pinion meets the ctiteria for publication, and if it does not meet the criteria for publication, the opinion shall be distributerd only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish".

(f) Rehearing...

(g) Action of the Court En Banc...

(h) Order of the Supreme Court...

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or a court.

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